

OVERSIGHT OF THE INDEPENDENT COUNSEL STATUTE

HEARINGS BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE ONE HUNDREDTH CONGRESS FIRST SESSION

MARCH 19, 20, 1987

Printed for the use of the Committee on Governmental Affairs



U.S. GOVERNMENT PRINTING OFFICE

WASHINGTON : 1987

75-269

For sale by the Superintendent of Documents, Congressional Sales Office
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OVERSIGHT OF THE INDEPENDENT COUNSEL STATUTE

THURSDAY, MARCH 19, 1987

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met at 9:32 a.m., in room SD-342, Senate Dirksen Office Building, Hon. Carl Levin, chairman of the subcommittee, presiding.

Present: Senators Levin, Mitchell, Bingaman, Cohen, and Heinz.

Also present: Linda J. Gustitus, Staff Director and Chief Counsel; Elise J. Bean, Counsel; Jack Mitchell, Investigator; Mary Berry Gerwin, Minority Staff Director and Chief Counsel; Frankie de Vergie, Chief Clerk; and Richard Allen, Professional Staff Member.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. Good morning everybody. This is the first hearing actually of the Oversight of Government Management Subcommittee for this Congress, and I want to welcome you all here.

I particularly want to tip my hat to our former chairman, Senator Bill Cohen of Maine. Senator Cohen ran this committee in an extremely fair way, as he does all of the things that he sets his mind to. He set a pattern of bipartisanship which we are going to seek to maintain. He had a record on this subcommittee of producing a great deal of work and a great deal of good quality work and of course we are going to seek to maintain that as well.

For six years he was chairman of this subcommittee, and I am delighted that he has chosen to remain as the ranking member of this subcommittee.

We are going to have a firm goal of ending this hearing at quarter to one. That means that we are going to have to ask our witnesses to summarize their statements. The entire statements will be put in the record, but if we are going to keep to that schedule, it is going to be necessary to summarize the statements so that we will have time to ask the witnesses questions.

We will follow a ten-minute rule for questions by the Senators. If there is time, we will have more than one round of questions for the witnesses, but at least for the first round we will have a ten-minute rule.

The first witness that we have this year—well, let me make my own opening statement before I call on Mr. Bolton.

The independent counsel statute that we are looking at this morning addresses one of the most delicate tasks facing government: investigations of high-ranking officials for criminal misconduct. In such cases, more than any others, the public needs to know that the investigations are being handled fairly and that suspected officials are receiving no better or no worse treatment than anyone else in our criminal justice system. For government to have the confidence of our people, our people need to know that cronyism and political protectionism are not going to be substituted for justice.

That was the purpose of the independent counsel statute when it was enacted in 1978, and reauthorized in 1982. That remains our objective as we prepare for reauthorization, before the current expiration date next January.

The need for this statute has never been greater. Four independent counsel investigations are currently proceeding, more than ever before at one time, and the first indictment has now resulted from the appointment of an independent counsel.

The investigations are looking at the activities of persons who are close to the President, who had enormous responsibilities in the government, and who are suspected of abusing their positions of trust. Without the independent counsel process, public trust in the government to resolve these cases fairly would be lost.

Because of the vitally important and almost essential role which the independent counsel role plays, it is imperative that the statute not only be reauthorized, but also reaffirmed and strengthened.

Not everyone agrees. Over the past weeks we have witnessed court challenges to the statute by Michael Deaver, former senior adviser to President Reagan; and Lieutenant Colonel Oliver North, former staff member at the National Security Council. Mr. Deaver and Lieutenant Colonel North did not seem to oppose the statute when the independent counsel investigations were initiated. Mr. Deaver, in fact, said he welcomed it.

But the effectiveness of the statute has not only apparently given them pause—it has caused them to take aim at the heart of the process itself. They are challenging the statute because it is doing what it was designed to do: insure the impartial investigation and prosecution of alleged criminal misconduct by persons close to the President. The statute is being challenged by them not because of its failure, but because of its success.

The judges who have considered the Deaver and North lawsuits have predicted that the statute will withstand constitutional scrutiny and have so far refused to shut down the process. It can be expected that other constitutional challenges will follow until the Supreme Court ultimately rules.

This hearing will touch on some of the constitutional issues at stake, including the Deaver and the North challenges, and will examine how the constitutional status of the statute can be clarified. But the Deaver and North court cases are not the only assault upon the statute that has taken place over the past five years. This hearing will also examine a different kind of assault, the indirect kind of assault that I believe has taken place by a key party in the independent counsel process—the Department of Justice.

The investigative staff of the Oversight Subcommittee has over the past months reviewed the cases handled by the Department of Justice under the independent counsel statute. They have examined documents and conducted interviews of such persons as independent counsels, defense counsels in independent counsel cases, persons associated with the special court, past and present government employees, legal scholars, and others.

A pattern has emerged which suggests that for the past five years the Department of Justice has been undermining the independent counsel statute by misapplying its provisions and abusing the Department's decisionmaking authority.

This Department of Justice has never fully supported the independent counsel process. In 1982 it argued for the statute's repeal and today it challenges the statute's constitutionality. After Congress reauthorized the law despite Department of Justice opposition in 1982, Justice found alternative ways to undermine our mandate.

I am not disputing here the Justice Department's right to attack the constitutionality of this statute in the courts or in testimony before this body, although the President chose not to exercise his right of veto in 1982 and although the Justice Department position does play into the hands of Mr. Deaver, Mr. Poindexter, and Lieutenant Colonel North. What I do mind is their trying to undermine the statute through the back door after being so unsuccessful using the front door.

The Justice Department's role under the statute is, for the most part, confined to the critical early stages of the process, the events leading up to the decision to request an independent counsel.

There are three key steps which are the responsibility of the Attorney General.

First, upon receiving information about possible wrongdoing, the Attorney General must decide if it concerns a person covered by the statute. If it does, the Attorney General must then decide if the information is specific and from a credible source. This is the second key step. If the information is specific and from a credible source, the Attorney General must launch a preliminary investigation and at the end of it decide whether to request an independent counsel.

The decision on whether to seek an independent counsel is the third key step in the process and must be in writing and filed with the special court. These steps are set forth on that exhibit which is to our left.

As I indicated, our subcommittee's investigation indicates that over the last 5 years the Justice Department has not executed its duties under the independent counsel statute in the manner expected and required by the statute.

First, the Department of Justice has refused to conduct preliminary investigations in cases where the statute has required it. In cases where the Department received specific information from a credible source about a possible criminal violation by a covered individual, the Department failed to initiate the preliminary investigation required by the statute.

For example, in each of three court cases, comprising all the published case law looking at the Department's conduct in independent counsel cases, the judge has held that the Department had re-

ceived specific and credible information of wrongdoing by covered officials and had improperly refused to proceed. Even after these judicial findings, the Department of Justice refused to go forward with the cases. While the orders were reversed or vacated on other grounds, the factual findings of the three lower courts were undisturbed.

In the Department of Justice's investigation of Ambassador Whittlesey, the Department spent 6 weeks flying attorneys to Switzerland, France, and across the United States investigating information submitted by the State Department Inspector General's Office, an undoubtedly credible source, about specific allegations of possible wrongdoing—the alleged misuse of government funds.

Justice described its investigation as an "inquiry," did not comment on whether or not the information was specific and from a credible source, elaborately analyzed the elements of the crimes involved, determined that evidence for certain elements was insufficient and, in so doing, avoided initiating a preliminary investigation.

By avoiding a preliminary investigation, the Attorney General avoids accountability, because only if there is a preliminary investigation is the Attorney General required to file an explanation of his actions with the court.

In the Whittlesey case a filing was eventually made because a subsequent allegation of obstruction of justice did trigger a preliminary investigation and the Attorney General saw fit to explain both sets of allegations.

Second, in the Whittlesey case and in other cases which the subcommittee staff has reviewed, the Justice Department has been imposing a new standard at the pre-preliminary stage; that being a determination whether or not the evidence of intent is sufficient. Absent an obvious situation, weighing conflicting evidence of intent at this initial stage is contrary to the concept of the process envisioned by this statute, particularly since the issue of intent is one element of a crime most vulnerable to bias.

A similar misapplication of the intent standard has occurred when the Justice Department has considered whether or not to seek an independent counsel after a preliminary investigation, and we will be looking at those cases also during this hearing.

This misuse of the element of intent is exacerbated in cases where the Attorney General has personal involvement with the subject individual. The statute does not now include standards indicating when an Attorney General should recuse himself from the independent counsel process, and there is some debate as to which standards should apply.

Tomorrow's hearing will focus in part on this issue. However, we should recognize how important recusal becomes when the Justice Department has made triggering the independent counsel statute turn on whether or not the subject individual has the requisite criminal intent.

For example, in the cases involving Ambassador Whittlesey and Edward Schmults, it was the Attorney General himself who made the decisions about the sufficiency of the evidence of criminal intent, even though he was personally involved to some degree in

the underlying events which gave rise to these cases and knew these individuals.

Couple these actions with the Attorney General's denial of the application of an independent counsel to expand her jurisdiction to cover Mr. Schmuts, and you have baked a multilayer cake of appearances of a conflict of interest. The icing comes when the Attorney General then opposes the independent counsel's request before the special court for the expanded jurisdiction to cover Schmuts.

On another matter, the statute instructs the Attorney General to consider the Department's prosecution policies when deciding whether to request an independent counsel. The Department of Justice has used this authority to change the standard itself by which an independent counsel should be requested.

The Department has a policy that prosecutions should not go forward if there is not a reasonable prospect of conviction. The statutory standard is whether there are reasonable grounds to believe that further investigation or prosecution is warranted.

By following the Department's policy instead of the statutory standard, the Department has substituted its standard for that of the statute. The standard the Justice Department uses is one that logically should be applied after a criminal investigation has been concluded, not at the time a preliminary investigation is being conducted, in large part because the important advantages of subpoena and grand jury are not available at that point in the proceedings.

Still other abuses come to light in the EPA case discussed earlier relative to Mr. Schmuts and to Carol Dinkins in which the Department missed the 90-day deadline for completing the preliminary investigation. When this deadline is missed, the statute compels the Department to go forward with the case and request an independent counsel. The Department, however, refused to comply with the statute and, as I mentioned earlier, is now battling to prevent the investigation of these individuals by a sitting independent counsel assigned to a related matter.

Elaborate pre-preliminary investigations to avoid triggering the statute, missed 90-day deadlines, questionable standards for refusing to seek independent counsel, and failures of recusal despite an appearance of a conflict of interest demonstrate a pattern by which the Department of Justice has been able on a number of occasions to undermine the independent counsel process.

This means that in the coming months we must review the statute with an eye towards not only maintaining and strengthening its constitutionality, but also preventing a Department of Justice that does not like the statute from undermining its purpose and its guarantees.

At this point let me call upon Senator Cohen for an opening statement.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Thank you very much, Mr. Chairman. I am pleased that the subcommittee is once again holding hearings on this important issue.

As you pointed out in your opening remarks, this is not something that is new to this subcommittee. Back in 1981 and 1982 when I had the great privilege of chairing the subcommittee, we also conducted oversight hearings to determine whether the law that was adopted back in 1978 in fact was meeting the goals that Congress had in mind.

Frankly, as we reviewed the process at that time, we found that the law had been written in such a way that as well as making sure that top-level officials are not given preferential treatment and thereby held to a different standard of conduct in our society, that the law was written so stringently that they were being treated differently, indeed, that they were being prosecuted in cases where ordinary citizens would not have been prosecuted.

So we decided to try and refine the law and to make it more equitable in its application. Some of the changes that we adopted, such as by giving the Department of Justice flexibility, for example, to determine whether or not the source that is providing the information alleging that a criminal act had taken place was a credible source, really were designed to put a little more equity into the system.

I think, as Senator Levin has pointed out, however, what we do not want to do is see this congressional grant of flexibility being construed as some sort of license on the part of the Department of Justice to impose different standards.

Secondly, I think we have to point out that a purpose of these hearings, at least from my perspective, is to reaffirm the need for an independent counsel process itself. This has been under continuous attack or challenge from the Department of Justice from its inception and it does not apply to any one administration. It is historically true.

I recall, for example, that Elliot Richardson, when we were deliberating whether we should ever create such a process, was also opposed to institutionalizing the independent counsel process itself because it was seen as not only a challenge to the separation of powers, but somehow as an assault upon the institutional integrity of the Department of Justice, implying that the Department could not be called upon to carry out a thorough investigation of alleged criminal wrongdoing.

But it is my own judgment that, number one, we should make this process permanent. Earlier this week I introduced a bill to do exactly that and I was pleased to have Senator Levin cosponsor that measure. It was designed to make it permanent because we have to reaffirm the fact that we will not tolerate alleged wrongdoing by top-level officials or allow facts to be buried.

Secondly, it seems to us that the individuals who are the subject of such allegations will be in a better position to assert they have been given a clean bill of health after this independent counsel has conducted a thorough investigation, comes to a conclusion, and presents that report to the court.

Indeed, I think that is the reason why Mr. Deaver and others sought the refuge of the independent counsel process, knowing full well that if they got a clean bill from that independent counsel that would remove all doubt about the allegations; whereas, if it

had come from the Attorney General or the Department of Justice, a cloud still might have remained.

So I believe from a public policy point of view, we ought to make this process permanent and remove the sunset provision.

In addition to that, I think we have to require the Attorney General to recuse himself from making determinations under the law when the person suspected or alleged of having committed a wrongful act has a personal or financial relationship with the Attorney General. I think we should change the law to specify when the court may honor the request of an independent counsel to expand his or her prosecutorial jurisdiction to investigate additional matters or persons. I know that the Department of Justice is opposed to the request on the part of an independent counsel to expand the jurisdictional grant. I believe we have to achieve some sort of refinement of the law to take into account legitimate concerns of the Department of Justice, as well as the legitimate needs of the independent counsel.

I believe the bill that Senator Levin and I have introduced will accomplish that. I think we also have to amend the trigger for the preliminary investigation under the Act so that the trigger will take effect when an Act is alleged which "may" have involved a criminal wrongdoing instead of only when the allegation is that a crime "had" been committed.

This legislation that we have proposed is certainly not all-encompassing and may not be entirely perfect as we have introduced it. I remain open in the course of the next two days to listen to the testimony of witnesses from the Department of Justice as well as those who would take issue with some of the actions that the Department of Justice has engaged in, in terms of how to deal with the independent counsel law.

I think, Mr. Chairman, it is a very important, very timely, and very necessary series of hearings that you have convened.

Senator LEVIN. Thank you, Senator Cohen.

Senator Bingaman, do you have an opening statement?

Senator BINGAMAN. I do not, Mr. Chairman. I commend you for having the hearings. The issues are very important and of course the timing of these hearings is excellent because of the tremendous importance of pending cases that rely upon the continued vitality of the statute. So I am glad to be here.

Senator LEVIN. Thank you, Senator Bingaman.

Now we will call on our first witness, John Bolton, who is an Assistant Attorney General for Legislative Affairs with the Department of Justice.

We want to welcome you, Mr. Bolton. If you would, while you are standing, our subcommittee rules do require witnesses that may be testifying as to facts to take the oath.

[The witness was sworn by Senator Levin.]

Senator LEVIN. I thank you for being here. As I indicated, we are on kind of a difficult timetable, given the complexity of the issues and the number of witnesses that we want to hear from this morning.

If you would, please summarize your statement for ten minutes or so, and that would leave us time for questions. Your entire statement¹ will, of course, be made a part of the record.

**TESTIMONY OF JOHN R. BOLTON, ASSISTANT ATTORNEY
GENERAL, LEGISLATIVE AFFAIRS**

Mr. BOLTON. Thank you very much, Mr. Chairman. I appreciate the opportunity to appear today before the subcommittee to discuss reauthorization of the independent counsel.

I would like to stress at the outset that we are not here today to oppose reauthorization. We are here today to support reauthorization of a constitutional statute and we look forward to the opportunity to work with the subcommittee to fashion such a statute.

I would note also that the administration has demonstrated its commitment to the independent counsel process, specifically in the Iran/contra matter, by taking the extraordinary step of appointing Judge Walsh—the independent counsel designated by the Division of the D.C. Circuit—as an employee of the Department of Justice and the head of a separate independent counsel office within the Department of Justice so that, in the event that the litigation brought by Colonel North ever becomes ripe or fit for adjudication, and if Colonel North is successful on the constitutional merits, Judge Walsh's work can continue.

We negotiated with Judge Walsh the regulation which the Attorney General has promulgated creating his new office within the Department of Justice. We have also done that with one other independent counsel and are in the process of making the same offer to all of the other independent counsel that are out there.

Senator COHEN. Mr. Bolton, could I inquire as to whether Judge Walsh is considered to be an employee of the Justice Department for this purpose?

Mr. BOLTON. As I indicate in the prepared testimony, Senator, we consider Judge Walsh to be a special government employee whether or not you consider him in his status as independent counsel appointed by the court or as appointed by the Attorney General. In our view, he and his staff stand in exactly the same position under either mode of appointment.

Mr. Chairman, I might say also before I go on that the Department fully agrees with much of what you said about the need for complete impartiality and the perception of complete impartiality in the investigation of alleged wrongdoing of high government officials and it is for that reason, as I said at the outset, that we do support the authorization of a constitutional independent counsel statute.

For the past 14 years, this Department has had an opportunity to testify on various occasions about independent counsel statutes and different kinds of proposals with a single exception, on every such occasion our testimony has included questions concerning the constitutionality of legislation that would remove the function of prosecuting crimes from Executive Branch control. Beginning in 1973 with then Acting Attorney General Bork, various Department offi-

¹ See p. 109 for Mr. Bolton's prepared statement with attachments.

cials, including Attorney General Ed Levi in 1976, Deputy Attorney General Tyler later that year, and Attorney General William French Smith in 1981 when he informed the Senate Legal Counsel of the grave doubts the Department still possessed about the constitutionality of the statute as then written.

The testimony that I have presented to you in written form and will summarize here follows this long line of Department of Justice precedents. We agree with such distinguished former Department officials as Acting Attorney General Bork and Deputy Attorney General Tyler, both of whom have served as respected federal judges, that the Constitution does not permit legislative or judicial intrusion into the Executive function of criminal prosecution.

Mr. Chairman, our testimony summarizes the extensive constitutional learning that we believe applies in this case, beginning with *Buckley v. Valeo*, a case where the Supreme Court in 1976 held that the appointment mechanism of the Federal Election Campaign Act as then written, which vested appointment of four of the six members of the Federal Election Commission in officers of Congress was unconstitutional.

The court reasoned in that case that granting civil law enforcement authority to the Federal Election Commission when its members were not appointed by the President and confirmed by the Senate as required by the Constitution, was invalid.

Surely here where criminal law-enforcement authority is vested in the independent counsel, the appointment mechanism should conform to the Constitution, which we believe requires both Executive appointment and Executive control over the work of the independent counsel.

These two points are really very closely related. In order for the Executive to perform its core constitutional functions, the Executive authority must be able to direct and control the work of its officers.

If I could quote briefly from Judge Bork's opinion in *Nathan v. Smith*, Judge Bork said:

If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided upon into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive.

We discuss at some length, Mr. Chairman, and I will not go into it here, the precedents dating back to *Myers v. The United States* on the importance of Executive control over the law enforcement function. I would just like to take a moment to say as we do in the testimony, that we do not consider the position we have taken here to be in any way contrary to the teachings of *Humphrey's Executor* or *Wiener v. United States*.

Those were cases that limited the Executive authority to remove officers of so-called independent agencies, the Federal Trade Commission and War Crimes Commission.

The court in those cases noted that the two commissions in question exercised quasilegislative and quasijudicial functions. That difference in and of itself distinguishes those cases from the independent counsel who exercises no quasilegislative or quasijudicial functions. He is exclusively a law-enforcement official and is therefore performing Executive Branch functions.

We cite in our testimony, Mr. Chairman, the extensive history surrounding the Appointment Clause in the Constitution; the contemporaneous recognition by Madison and Jefferson that appointment is an executive function. We think that is clearly the intent of Article 2.

I might point out here as well, we do not consider *Ex parte Siebold* necessarily to hold to the contrary. *Ex parte Siebold* involved election observers, and even assuming that decision was rightly decided, we think that election observers are clearly distinguishable from the enormous power wielded by the independent counsel; the power to seek grand juries to return criminal indictments against individuals.

I might note also, Mr. Chairman, that we view any construction of the statute that would permit the independent counsel to seek additional prosecutorial jurisdiction from the special division to pose the gravest constitutional difficulties because we think that once the Attorney General, pursuant to the statute, has determined that he will not seek appointment of an independent counsel as to a particular individual or in connection with a particular matter, that that decision is not reviewable. We believe it is not reviewable expressly by the terms of the statute, and that the statute would be constitutionally infirm if that provision were not there.

We note also in the testimony at some length the recusal policies of the Attorney General you mentioned in your opening statement, Mr. Chairman. We think that the Attorney General has in every instance performed under the strictest ethical and professional standards. But I would note also our position that we believe that the presumption should be that in every matter that comes before him, the Attorney General should not recuse himself. The Attorney General is the principal legal advisor to the President. He is confirmed by the Senate as such. He is named specifically in the independent counsel statute again and again, and we believe that although an individual can always be criticized for failing to recuse himself, that making decisions in these cases is a far more courageous and proper thing to do.

We concur with former Attorney General William French Smith in the letter that he has written to the subcommittee that says—and I quote: “I believe that the Attorney General should recuse himself only in the most extraordinary circumstances.”

We concur further with former Attorney General Smith when he says:

Attempting to prescribe by rules, standards and regulations how to exercise this judgment in doubtful cases in my view would be futile and unwise, another artificial effort to legislate an ethical standard.

The Department of Justice does have regulations involving personal, professional and financial conflicts of interest and we are confident that the Attorney General and all the attorneys in the Department who participate in independent counsel decisions abide by those standards and take them very seriously.

Mr. Chairman, in light of your desire to keep statements brief—there is quite a bit more in the statement—it is a lengthy one—we tried to be responsive to a number of questions that you posed to

the Department over the past several months, and I am happy to answer any questions that the subcommittee may have.

Senator LEVIN. Thank you, Mr. Bolton.

First let me ask you a direct question as to the Department of Justice's position on the constitutionality of the statute as presently written.

Is it the opinion of the Justice Department that the present statute, as written, is constitutional?

Mr. BOLTON. Mr. Chairman, it would take a proper case, obviously, to decide that. We have argued in the North litigation that for a number of reasons, that case is not fit for adjudication. It is not ripe, and particularly in light of the Attorney General's parallel appointment of Judge Walsh, there is no real remedy that Colonel North could get.

It would depend on the application of the statute as interpreted by the courts. It is conceivable that under certain circumstances the courts could construe the statute in a way to avoid the constitutional question.

We are believers in this administration in judicial restraint and we have not gone out of our way to find a case where we could argue the unconstitutionality of this statute. It would be difficult for me to speculate, and I say this respectfully; I would not want to limit the Department's ability to take a position in a proper case on any of a number of grounds of adjudication. But in a proper case the answer is that with respect to certain provisions of the statute, we would be prepared to argue its unconstitutionality. Obviously it would be for the court to decide.

Senator LEVIN. So that we can just focus on the Justice Department's opinion, what you are saying is that in your opinion certain provisions of the existing law are unconstitutional?

Mr. BOLTON. If construed in ways that would limit Executive control over the prosecutorial and investigative functions. It is possible that a court could construe the statute in a way that did not raise that question. As I say, we have not gone out of our way to argue the abstract constitutional issue.

Senator LEVIN. Mr. Bolton, I heard your answer that you have not gone out of your way and a court might do this and a court might do that.

I am asking you for the Justice Department's opinion as to provisions of this statute. Now, the critical provision of this statute provides that the independent counsel will be appointed not by the Justice Department, but by a special court.

Is that provision unconstitutional in your opinion? I know that a court might find it this or that and that there may or may not be a proper case that raises it. But my question to you is—and it is a direct question—in the opinion of the Justice Department, is that key critical provision of this independent counsel statute, as it exists—Section 593(b) which confers the appointment power for independent counsel on a special court—is it constitutional in your opinion?

Mr. BOLTON. I will try to answer this just as straightforwardly as I can. I think there is more doubt about the appointment question than there is about the control and removal question, in large part because of the decision in *Ex parte Siebold*.

But it certainly seems that *Ex parte Siebold* can be distinguished and that there are very grave doubts about the constitutionality of the appointment process as it is currently written. That is why we would be prepared to explore with you and the subcommittee alternative ways of appointment that achieve the same result, and that is the appointment of an impartial, unbiased, distinguished lawyer to conduct the investigation.

Senator LEVIN. Mr. Bolton, again you say you have grave doubts about the critical section of this statute. Does that mean you do not have an opinion? You have grave doubts, but you do not have an opinion?

Mr. BOLTON. I think that the constitutionality of the appointment issue is a difficult one.

Senator LEVIN. Not difficult. Do you have an opinion as to whether or not it is constitutional? Does the Justice Department have an opinion as to whether or not that section is constitutional?

Mr. BOLTON. We have an opinion only as set forth in the testimony, which states that there are very grave doubts about it.

Senator LEVIN. But you have not reached a conclusion about it?

Mr. BOLTON. No. There are differing opinions within the Department as to whether the present appointment authority is constitutional.

Senator LEVIN. So that there are grave doubts in the Department, but there is also support for its constitutionality in the Department?

Mr. BOLTON. I am trying to be as straightforward as I can. I would not say there is support for it. I would say that there is recognition that there are certain precedents that arguably support the proposition that the court can make the appointment.

Senator LEVIN. If that provision stays in the reauthorization bill, will you recommend that the President veto it?

Mr. BOLTON. Senator, I honestly could not answer the question as posed by you because it would depend on what else was in the bill as reenacted.

Senator LEVIN. Let me ask you a question. In the EPA case where you filed a report with the special court describing the preliminary investigation of three former Department of Justice officials—Olson, Schmults, and Dinkins—that report was filed with the court more than four months after the Department of Justice first received information in this matter.

The statute says that if 90 days—which is three months approximately—elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General “shall” apply to the special court for the appointment of an independent counsel.

Now, you missed the 90-day deadline by a month in your consideration of the EPA case. Why didn't the Department of Justice request an independent counsel to investigate Schmults, Dinkins, and other officials connected with the EPA matter as required by statute?

Mr. BOLTON. Mr. Chairman, your chronology is correct. The 90-day preliminary investigation did occur in the case of Olson, Schmults, and Dinkins. The preliminary investigation itself, howev-

er, did not begin until approximately a month after the receipt of the House report. As I have explained in correspondence with you that is attached to the testimony, the report itself was 1,268 pages long, as I recall, and it contained an enormous amount of information but it was written in such a way that although it named lots of individuals and it criticized lots of Executive Branch actions, we felt that we had first to see if we could link what was being alleged to specific individuals to see what exactly these individuals were alleged to have done.

In many cases we found that they were alleged to have done things that were slipshod, that were not the best policy conduct, but which did not amount to an allegation of anything unlawful. We believe that the statute does require—it is not on your chart over here—but it does require that we find that activity that is alleged specifically and credibly has to be unlawful before going forward. If it is not unlawful, there is no requirement to trigger a preliminary investigation.

So it was in the course of trying to digest an almost 1,300-page report that we did not trigger the preliminary investigation until we could assess it and understand it better.

Senator LEVIN. Let me go back to my question. Your position is, as I understand it, that the 90 days starts running from the time that "the Attorney General personally determines that information received by the Department of Justice warrants further investigation or prosecution." That is what your letter says.

Where did you get that from? I mean the statute says that the 90 days starts running from the date the information is received.

Mr. BOLTON. There is a question when you have a Department with some 63,000 employees, where you have 94 U.S. attorneys around the country, over 50 FBI field offices, that information can come in in any of a number of ways.

We have tried to establish some kind of reasonable standard for uniform treatment of this information when it comes in.

Senator LEVIN. I am just asking you, why do you substitute a different standard than the statute provides? Now, the statute is clear. You can talk about all of this other stuff. You have 1,400 of this and 2,000 of something else to digest 1,500 pages. But that is another issue. I am just talking about the law. The law says that the 90 days starts running from receipt of the information.

Mr. BOLTON. It begins running from the time that the information is deemed sufficiently specific and credible about a violation of a crime.

Senator LEVIN. Sir, you are reading a different statute. Now, the statute says the 90 days elapse from receipt of the information. The information being referred to is the information referred to prior to that, when the Department receives information. It received information in the EPA case 120 some days prior to the time that the Department of Justice moved in this case. It only had 90 days. Now, that may sound like a quibble, but it isn't. It is a critical issue because I believe and my staff believes that this period has been abused and that this law has been abused in many ways.

My question to you is: Is it not true that the 90 days starts running from receipt of the information under this statute? And is it not true that your letter to us says that the 90 days begins when

the Attorney General personally determines that information received from the Department of Justice warrants further investigation or prosecution?

I am asking you, where did you get that standard from? The law does not say anything about that. The law says that the 90 days starts running from receipt of the information.

Mr. BOLTON. Let me, if I could, quote from another section of the statute, because I think that is important in understanding what triggers the investigation. I am reading now from Section 591(a) which says the Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any federal criminal law other than a petty offense.

So that in a situation where it is alleged that an individual undertook some action, there has to be a determination that that action, if everything we learned about it were true, in fact were criminal.

Let me give you a hypothetical if I might. Let us assume that the Department receives credible and sufficiently specific information that a person intentionally drove 25 miles an hour in a 35-mile zone, assuming that violation of the speed limit would be a sufficiently serious crime.

The information is specific, it is credible, intention is there, but the activity would not be criminal. Driving 25 in a 35-mile an hour zone would not amount to unlawful activity.

So, at that point, there is no requirement that would trigger a preliminary investigation.

Senator LEVIN. Mr. Bolton, you are reading from a different section of the statute. The question is not whether or not he is required to trigger an independent investigation. The question is when does the 90 days start running? There is a specific section on that. Your letter to us and your position ignores that section.

My time is up. I will come back to that on the second round, assuming we have time for one. Let me now call upon Senator Cohen.

Senator COHEN. Mr. Bolton, if I could go back to the constitutionality issue for a moment, isn't it fairly clear that the Department of Justice has historically been opposed to the independent counsel or special prosecutor legislation by virtue of the fact that it believes that the appointment of an independent counsel by the court violates the separation of powers doctrine?

Mr. BOLTON. There has been testimony that I think is consistent with what I said this morning about the gravest doubts that we have had about that. I think there are opinions both within the current Department and in past Departments that court appointment under any circumstances is unconstitutional.

Senator COHEN. Is there any opinion within the Justice Department that supports the appointment by the court?

Mr. BOLTON. I think there are those who believe that it can be argued successfully that it would be constitutional to have court appointment. I think the graver issues, the ones that are much more serious from a constitutional point of view, have to do with

the issue of control of the independent counsel's functions and the removal question.

Senator COHEN. Is the Department afraid to express an opinion on the constitutionality for fear of jeopardizing the Deaver or North cases?

Mr. BOLTON. In the North case, we do not think that any expression would jeopardize that because of the parallel appointment. There has been no parallel appointment in the Deaver matter and apparently will not be, at the request of the independent counsel in that case.

Senator COHEN. If you make an extensive preliminary inquiry—rather than a preliminary investigation—let us call it a prolonged inquiry—and you at that point decide that there is not any need to go forward with even a preliminary investigation, in other words, that the law has not been triggered, you are not required to file anything with the court. Is that correct?

Mr. BOLTON. That is correct.

Senator COHEN. How do we know whether or not the process is then being used or abused if Congress or the courts have no knowledge as to whether or not you have applied the right standards?

Mr. BOLTON. We believe that the statute quite properly recognizes that, in many instances where consideration of an independent counsel is taken, the privacy requirements of such investigations dictate that they never be made public.

That is done, and I think Congress recognized, and quite properly so, that they did not want the independent counsel statute used either for partisan reasons or for media appetite or anything else; that sometimes persons can be accused most unfairly of things that they never did. So Congress wanted privacy protections so that individuals' reputations and careers would not be damaged.

As to those individuals as to whom it is concluded that no preliminary investigation will be triggered, we think that conclusion shows that the allegations are so unsubstantiated, so off-the-wall, that even though there are no explicit privacy protections in the statute, we nonetheless want to protect the identity of those who came under even preliminary inquiry.

I might say that we have been in discussions with staff of the subcommittee to see if we cannot accommodate what I think is your legitimate question there: how to understand better how we apply the statute, so you can consider what if any changes to make during reauthorization. We think we can reach an accommodation with you that protects both the privacy of the individuals who are involved and also, I might say, the confidentiality of the deliberations, particularly of our career prosecutors so that there is no hint even of political interference in their deliberations.

Senator COHEN. You have indicated that in those cases the preliminary or initial inquiry would conclude that the allegations were so unsubstantiated or so "off the wall" that it would not even warrant triggering the preliminary investigation.

That is not the only standard you are applying. It is not only the question of whether or not it is a credible allegation, or so unsubstantiated or off the wall, but now you are also applying the question of whether or not there was criminal intent during this initial inquiry.

Now, I have a serious question as to how the Attorney General's office can carry out that kind of an initial inquiry prior to the preliminary investigation—saying there was no criminal intent.

Mr. BOLTON. Let me see if I can address that question. To have a violation of the criminal law for any particular substantive violation, there are usually several elements. In virtually every case, one of those elements is criminal intent.

In those cases—and we have listed some in the prepared testimony—

Senator COHEN. You only have to have the intent to commit the act.

Mr. BOLTON. Right. As defined by the courts and by the statutes. That is all I am talking about.

We have determined in some cases—and some are listed, as I say, in my prepared testimony—that there is no credible evidence of intent and indeed that further investigation even would not turn up any.

Senator COHEN. The case you cited in your testimony, though, deals with the element of perjury where, hypothetically at least, the person who testifies—but is not under oath—might have an intent to lie but not commit perjury because he is not under oath.

That is one element of intent. But suppose you have a much more complicated situation. Does the length of time determine? In the investigation, for example, is it a matter of degree or the amount of investigation required to resolve that issue?

I am thinking specifically, for example, of Attorney General Meese. As I recall, the investigation revolved around whether or not he had the intent to mislead or, or fail to properly fill out, forms required by law. That was an element of intent that was critical.

Should you be allowed to make that determination on an initial, pre-preliminary investigation?

Mr. BOLTON. We are not necessarily making the final decision on intent in every case. What we are looking for is a determination that further investigation would be warranted to determine whether intent is there. In several cases we have gone ahead with both the preliminary investigation stage and the seeking of the appointment of an independent counsel.

If I could just read very briefly from the testimony because we do talk about intent specifically there, the standard for proceeding is not high. The question is whether a reasonable prosecutor would conclude that the circumstances are such as to warrant further investigation into the matter.

In a relatively large number of cases, you could infer criminal intent, or at least infer it sufficiently so that you would go into the preliminary investigation stage.

Senator COHEN. Let me read our report to you. The report that we filed when we amended the Ethics Act said,

The new standard should not be interpreted to mean that an accuser must expressly recite the precise violation of criminal law alleged prior to triggering a preliminary investigation or show that all legal elements of a crime exist. The determination of whether there was criminal activity will be made by the Attorney General within the context of a preliminary investigation.

So this committee and the Congress specifically tied that kind of determination to the preliminary investigation, not a pre-preliminary investigation.

Mr. BOLTON. I think, though, that in a circumstance where you can conclude that no further investigation is going to turn up any new information and where the circumstances are such that one element of a crime is simply not there and that no further investigation would give you any more evidence on it, that at that point if an element is missing, whether it be intent or another underlying substantive element, that it is appropriate at that point to conclude that the preliminary investigation not be triggered.

Senator COHEN. Back in 1982 we tried to amend the law to again give some flexibility to the Department of Justice. What we had in mind at that time was the Hamilton Jordan case, as I recall, where he went through the process of the investigation at considerable expense to him and ultimately the taxpayer. Yet, the Department of Justice said that it never would have prosecuted such a case under normal circumstances.

So we took that into account and allowed an amendment for the Department of Justice in conducting its inquiry as to whether or not it would ever prosecute cases. Apparently the Attorney General is now relying upon the standard that it is an established policy of the Department not to recommend or institute criminal prosecution if there is no reasonable prospect that an unbiased jury would return a conviction.

The question I have is that if you use that standard, aren't you cutting off the possibility that a preliminary investigation would develop certain facts that would in fact sway an unbiased jury to return a conviction?

Mr. BOLTON. No, I don't think so. If you look at the three publicly available reports to the division of the court involving Mr. Schmults and Ms. Dinkins and Ms. Whittlesey, the conclusion is there is no reasonable prospect that further investigation or prosecution would be warranted. That is based on our understanding of the provision of the statute that you note was added in 1982 and the report that this committee generated.

The report of this subcommittee in 1982—because you were the driving force behind the changes—is almost all of the legislative history there is. But it does refer to written or other established policies of the Department of Justice, and that one written and well-established policy there is contained in a pamphlet called "The Principles of Federal Prosecution," which the committee I believe has, but if you don't have it, I would be happy to supply you a copy.

From "The Principles of Federal Prosecution" which was published in July of 1980:

The attorney for the government should commence or recommend federal prosecution if he believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless in his judgment prosecution should be declined because (a) no substantial federal interest would be served by prosecution; (b) the person is subject to effective prosecution in another jurisdiction; or (c) there exists an adequate non-criminal alternative to prosecution.

That is the standard, written, established policy of the Department that we take into account in making the decisions. It is not an effort to cut off further investigation, but a conclusion that there is no reasonable prospect, even after further investigation, that any additional evidence will turn up to warrant prosecution.

That is a decision that has to be made individually in every case because each case turns on individual facts.

Senator COHEN. My time is up. Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Senator Cohen.

Welcome to Senator Mitchell. We are delighted to have you on the subcommittee.

OPENING STATEMENT OF SENATOR MITCHELL

Senator MITCHELL. Thank you, Senator. I would ask that a statement of mine be placed in the record.

Senator LEVIN. It will be.

[Senator Mitchell's prepared statement follows:]

PREPARED STATEMENT OF SENATOR MITCHELL

It is particularly fortuitous that the Subcommittee begins its reauthorization hearings on the Independent Counsel law at a moment when challenges to its Constitutionality are rife.

The Supreme Court's rejection of Mr. Deaver's last-minute attempt to stall his indictment spoke of the presumption that laws passed by the Congress are Constitutional. Justice Rehnquist said that Mr. Deaver could not suspend that presumption in order to stay the workings of the law, under which he has now been charged with perjury.

These are the first criminal charges ever to have been brought under the terms of the Independent Counsel law, although this is only one of the many investigations it has triggered.

Regardless of that outcome of the particular criminal case, then, one fact is that the law works.

High government officials and former high government officials now know, in a manner that they may not have known before, that they cannot operate on the assumption that the laws applying to ordinary citizens will be more leniently applied to them.

That is one of the primary and most important functions the independent Counsel law fulfills. It ensures, as no other institutional arrangement has been able to do, that the highest officials in the land know that they dare not act as though they were above the law.

The challenges to the Constitutionality of the law are all based on a reverence for the separation of powers doctrine which would be impressive were the motivations not so transparent. It is claimed, in these challenges, that the merest impingement on prosecutorial discretion poses an instant and intolerable threat to the entire panoply of executive powers, a sweeping conclusion, given the well-known extent of Presidential powers under our system.

Our system demands and has tolerated, without weakening the presidency, the operation of independent offices for a broad range of public purposes. Each of those officials can and does enjoy a degree of insulation from arbitrary executive action.

The central challenge to the statute says the Independent Counsel is particularly intolerable because—for the particular defendant involved—he more or less constitutes the full weight of the Justice Department.

But of course, under our Constitution, even the full weight of the Justice Department cannot deprive any defendant of his rights.

And as a practical matter, the Independent Counsel is considerably more circumscribed than the Justice Department. His appointment is temporary. His prosecutorial range is established by others, not by his discretion. He may be dismissed for good cause—and a reckless disregard for the limits of his authority would certainly constitute good cause.

In a famous dissent, Justice Brandeis noted that:

"The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The pur-

pose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

The scheme of the Constitution does not give much support to the idea of hermetically sealed branches with mutually exclusive powers. The impeachment powers of the Congress, the ability to install "inferior Tribunals", the Congressional war power, the veto provisions are all efforts to *balance* powers, not to separate them.

The purpose of the Constitution is to govern the nation. The separation of powers is one element of that purpose, but it is not the purpose itself.

Here we have a statute, carefully drawn and very carefully reviewed a few years ago, whose purpose is to promote and ensure the even-handed administration of the criminal law.

Few government functions can be as vital to a nation.

This hearing process will allow us to examine the flaws in the statutory scheme under which the Independent Counsels operate. But we ought not to allow that review to cloud the primary purpose of the law: To prevent the politicization of justice.

Madison wrote in the *Federalist*, discoursing on the separation and balance of powers, that:

"No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

This principle does not hold up every casual exercise of Congressional authority, but there is not much evidence that this exercise has been casual.

The 1978 law was not written in the "heat" of the Watergate crisis, but four years later. The harsher, initial version of the act was loosened by the 1982 revisions to take account of Executive Branch objections. The Act is not permanently authorized but lapses regularly. All these facts are consonant with a degree of care on the part of Congress to respect, not undermine the core functions of the Executive.

In our review of the law, we can strengthen its ability to fulfill its purpose. But we cannot lose sight of its purpose.

Senator MITCHELL. Mr. Bolton, concerning the challenges by Mr. Deaver and Colonel North to the constitutionality of the independent counsel statute, have you, the Attorney General, or any other employee of the Department of Justice had discussions, either in person, in meetings, or in telephone conversations, with defendants, their attorneys or any other person regarding their challenges to the statute?

Mr. BOLTON. Concerning the constitutional challenge? I don't know if there have been any conversations in the Deaver case since neither the Department nor the Attorney General was named as a party in that case.

In the North case, I would assume that there have been conversations on just the procedural matters about briefing schedules and argument and things like that.

Certainly we did not coordinate in any way with the attorneys for Messrs. Deaver and North in terms of the substantive positions they took. In fact, as I mentioned earlier in the North case, we did not address the constitutional merits.

We certainly did not encourage, suggest, or assist in the preparation of any of their briefs on the merits.

Senator MITCHELL. Were you asked to do so?

Mr. BOLTON. Not to my knowledge.

Senator MITCHELL. When you made the prior statement, which was a rather categorical response, is that the result of an inquiry you made within the Department of Justice, of the Attorney General and others, or are you stating merely that your current state of knowledge on that is that you don't know of any such inquiry?

Mr. BOLTON. I have not made an inquiry into it, but I think if we had heard of a request like that, that I would know about it. I would be happy to check further, but I believe my earlier statement is correct.

Senator MITCHELL. Would you do that and respond in writing to the subcommittee, either stating as you have, that there were no such requests, inquiries, or conversations; or if there were, if you could describe them in detail both as to the participants, the time and the subject matter?

Mr. BOLTON. I would be happy to.

Senator MITCHELL. Thank you.

In response to a question by Senator Cohen, you said there were differences of opinion within the Department on the constitutionality question.

What is your opinion?

Mr. BOLTON. Well, there are several constitutional questions posed by the statute as written. One deals with the appointment of the independent counsel. One deals with the control and direction of the independent counsel's work, and one deals with the removal question.

I could not speak for all 62,000 of us but I believe that opinion is much more solid on the control and direction and removal questions than the statute is constitutionally infirm than on the appointment issue, as I mentioned earlier.

Senator MITCHELL. I didn't ask you to speak for all 62,000. I asked you to speak for yourself. What is your opinion on each of those three questions?

Mr. BOLTON. I believe as to all three, the statute is unconstitutional.

Senator MITCHELL. The statute is unconstitutional.

Mr. BOLTON. As to all three points: appointment, direction, and control, and removal.

Senator MITCHELL. What would you put in its place?

Mr. BOLTON. There are a number of possibilities that we would like to suggest to you. I am not in a position today to give you something definitive, but I could give you some examples.

For instance, if you had Attorney General appointment of the independent counsel, as we have done in the Walsh and McKay matters, with regulations that guarantee the independent counsel's independence, I think you could satisfy the concern of the subcommittee—which is quite a legitimate concern—that investigation of high-ranking government officials be conducted without any doubt at all as to the complete legitimacy of the work of the prosecutors involved.

I think that there is concern, obviously, on the part of many that an independent counsel who is not appointed in the present fashion would somehow be subservient to the Attorney General or the President. I think our constitutional system is sufficiently fertile that we can come up with a way of doing it where in effect you will have exactly what is going on now, but without the separation of powers problems.

Senator MITCHELL. If I may just interject, your argument from the constitutionality question dealing with appointment and re-

moval is at heart, is it not, that the power to appoint and remove is the power to control?

Mr. BOLTON. Exactly. They are all inextricably intertwined.

Senator MITCHELL. But now you are saying that in this case the Attorney General should have the power to appoint and remove but he won't have the power to control.

Mr. BOLTON. I think it is a matter, very frankly, of practical politics. I think any President or any Attorney General under this statute, or under one that the subcommittee may write, who attempted to remove an independent counsel who was getting close to or was developing evidence that might lead to indictment of a high government official would pay an enormous political cost if he were removed for that reason—and should pay an enormous political cost.

It has only happened once before, and we can ask Richard Nixon what political cost he paid for it.

I really think that it would be a mistake to leave a statute in place that does, in the opinion of many people—not simply Departments of Justice for the past 14 years—but many scholars and people who have thought about this very carefully—leave in place a statute which if declared unconstitutional at some point in some litigation would risk whatever other work was being done by other independent counsel who had not accepted a parallel appointment by the Department of Justice.

For instance, if I were a witness in a matter where there were no parallel appointment, and the independent counsel appointed in the present fashion offered me use immunity or even transactional immunity in exchange for my testimony, I would be worried that if I accepted that offer and testified and then the independent counsel who had granted me that immunity, if the appointment of that independent counsel were later declared unconstitutional, that I would be at very grave risk.

I think that there is a lot of concern, and that is why we moved expeditiously with Judge Walsh to give him the parallel appointment.

Senator MITCHELL. Why did you do that in the North case and not the Deaver case?

Mr. BOLTON. We asked Judge Walsh first if he were interested in parallel appointment. He indicated he was. We negotiated with him the regulations that the Attorney General promulgated some weeks ago. It is my understanding that we made the same inquiry of Whitney North Seymour and he declined a parallel appointment.

I mentioned earlier we are in the process of contacting all of the other presently sitting independent counsel to see if they are interested in the same thing. One other independent counsel, Mr. McKay, has also already accepted a parallel appointment.

Senator MITCHELL. So of those who have been offered it, Seymour is the only one who declined it?

Mr. BOLTON. So far. I believe that letters have not actually gone out formally to all of them, but that that either will occur today or in the next few days.

Senator MITCHELL. On the subject of recusal, Attorney General Meese recused himself in the Deaver and Nofziger cases, not in the Whittlesey, Olson, and the Iran/contra cases.

What are the standards by which the Attorney General made his decisions as to when recusal should occur?

Mr. BOLTON. The standards that are applicable to all Department employees in regulations that deal with personal, professional, or financial conflicts of interest—and we believe the Attorney General is well within those regulations—I would be happy to go into them in specifics—they are set out in the written testimony.

Senator MITCHELL. Is there a written statement of recusal in both cases where recusal occurs and where it does not occur?

Mr. BOLTON. Let me see if I understand that question. Are you saying is there a file memo generated in each case?

Senator MITCHELL. Yes. Is there some document which describes the action and its justification in all instances?

Mr. BOLTON. Not in all instances, no. We have a request pending from the subcommittee for documents along the lines of what you are talking about and we are still looking for those. We will be responding back to the committee.

Senator MITCHELL. When you say you are looking for them, my question is—let's take one case. The Attorney General recused himself in the case of Deaver and Nofziger.

Is there a written document in which that decision is noted and the justification for it made?

Mr. BOLTON. I don't know and I am attempting to find out. I can say as a matter of practice, in the case of most Department of Justice officials that where there is a decision to recuse, that typically there is not a written document. In some cases there is, but in most cases there is not.

Senator MITCHELL. How could anyone then determine whether or not standards have been met in recusal? If there is no statement of the reasons for recusing or not recusing, how could anyone objectively determine whether standards have been met?

Mr. BOLTON. I think every recusal decision is inherently unique and it depends on the particular facts and circumstances of the individual involved. In the case of Messrs. Nofziger and Deaver, as we say in the prepared testimony, the Attorney General's long-standing personal and professional relationship made it plain that he instantly recused himself when he learned that they might be implicated in an IC matter.

Senator MITCHELL. Did he have a longstanding relationship with Ms. Whittlesey?

Mr. BOLTON. No. I was just about to say that the Attorney General stands in relationship to Mrs. Whittlesey or Mr. Schmults or Ms. Dinkins in the same way he stands with respect to hundreds of other Executive Branch officials. As I said in the prepared testimony, and said also before you arrived, we believe that there should be a presumption against the Attorney General recusing himself.

I recognize that that leaves us open to criticism, but I think that the Attorney General is the President's principal legal adviser. He is the one specifically charged by this statute, and I am sure it was carefully drafted. The statute does not say the Department of Justice shall do X, Y, and Z. It says the Attorney General. So that it

should be, as Attorney General William French Smith said, only in the most extraordinary case that the Attorney General does recuse himself.

I might say also that because the independent counsel statute itself is in essential respects a recusal statute, because of a presumption of conflict of the entire Department, that there is a kind of rule of necessity operating here that the Attorney General really does need to make those decisions.

Once again, where there has been that kind of relationship in two public matters and one nonpublic matter, the Attorney General has recused himself.

Senator MITCHELL. My time is up. I will just comment that the fact that each case is unique is not a reason or failing to have a process by which adherence to standards can be determined. Every lawsuit is unique; every trial is unique. And yet we have objective standards which must be met. Some process by which we can measure whether those standards are met would seem to me to make sense for the Department, whoever the Attorney General is, to establish a procedure with respect to recusal so there is some method by which someone will write down that recusal has or has not occurred for the following reason. To suggest that it is done in a manner that does not—according to what you say, you do not know whether it has been done or not and that you are going to find out—I think leaves open the question.

I thank you, Mr. Chairman.

Senator LEVIN. Thank you, Senator Mitchell.

On that recusal point, first, does the Attorney General^t consider himself bound by the recusal regulations that apply to everybody else in the Department of Justice in applying this statute?

Mr. BOLTON. Yes, he does. As I say, though, given that the independent counsel statute is itself a recusal statute, there is some question, and I believe the Office of Government Ethics of the Office of Personnel Management will take the position that the Attorney General is bound by a much lesser standard. That is to say, he is much freer to engage in these things—

Senator LEVIN. My question is a very direct one. Does he consider himself bound by the regulations relative to recusal in his application of the independent counsel statute?

Mr. BOLTON. Yes, I believe he does.

Senator LEVIN. As to the constitutionality of this statute which Senator Mitchell asked you about, we asked you earlier whether the Department has an opinion on the constitutionality.

Are we to assume from your prior answers, when combined with your answers to Senator Mitchell's questions, that the opinion you gave us just a few moments ago as your own is not necessarily the opinion of the Department of Justice?

Mr. BOLTON. I think it is standard practice for the Department and I think sound practice that it not articulate a final opinion on any of a range of issues that may come into litigation until such time as it is ripe to do that.

Senator LEVIN. Does the Attorney General have a personal opinion as to the constitutionality of the statute in the three areas that Senator Mitchell and you went over?

Mr. BOLTON. I can say that he has personally reviewed the testimony that I have submitted to you in writing, and fully concurs in it.

Senator LEVIN. Does he share your opinion as to the constitutionality of this statute?

Mr. BOLTON. I think he certainly has all of the constitutional concerns that we have expressed in the testimony. Whether he would share my opinion in every jot and tittle, I just don't know.

Senator LEVIN. Does he share the opinion that you have given us here today as your own?

Mr. BOLTON. I just don't know.

Senator LEVIN. So you haven't talked to him as to whether or not he shares that opinion that you have just described to us as your own?

Mr. BOLTON. I think in our own internal deliberations, what we try to do is identify the constitutional questions that we have about the statute. And the Attorney General, I think quite properly, reserves judgment so that he can continue to maintain his flexibility to hear arguments from everybody within and without the Department who has an opinion on it.

Senator LEVIN. My question is, have you discussed with him his own opinion as to the constitutionality or have you heard him express his own opinion as to the constitutionality of this statute?

Mr. BOLTON. No.

Senator MITCHELL. Mr. Chairman, may I interject? I have to go to another hearing on catastrophic health care. May I ask that the committee write Mr. Seymour a letter and ask him what his reasons were for declining the parallel appointment?

Senator LEVIN. We will do that. Was that declination in writing?

Mr. BOLTON. I would have to check on that. I believe it was, but I am not certain.

Senator LEVIN. And there was a request to him to do that which he turned down?

Mr. BOLTON. Yes. Well, not a request. There was an offer to make the parallel appointment in the same fashion.

Senator LEVIN. And you don't know whether his declination was in writing or not?

Mr. BOLTON. I do not.

Senator LEVIN. Do you know if the offer was in writing?

Mr. BOLTON. I believe it was, but I will check.

Senator LEVIN. Could I at least raise one hypothetical solution? That is, that maybe Mr. Seymour is concerned that under the Act as it is written, that the court cannot appoint any person as an independent counsel who holds or recently held any office of profit or trust of the United States.

So he might very well have nullified his appointment as an independent counsel by accepting an appointment under the auspices of the Attorney General.

Mr. BOLTON. I might say that we considered that question and concluded that that particular provision of the independent counsel statute would not be violated by the parallel appointment.

Senator COHEN. Hasn't Colonel North raised this as an issue already?

Mr. BOLTON. I beg your pardon?

Senator COHEN. Has not Colonel North raised this as an issue already?

Mr. BOLTON. Colonel North, in a second lawsuit filed after Judge Walsh's parallel appointment, challenged the constitutionality and that provision of the statute, as I understand it.

Senator COHEN. Based on that particular provision?

Mr. BOLTON. As I understand it, that is correct.

Senator LEVIN. Mr. Bolton, it seems to me what the Attorney General is basically telling us—or what you are telling us is your personal opinion so we have got to read between the lines here a bit, although I think what appears between the lines is a lot clearer than what appears on the lines—what you are telling us is that the Department of Justice wants to appoint the independent counsel.

Mr. BOLTON. I think that is certainly one clearly constitutional alternative.

Senator LEVIN. He wants to be able to remove the independent counsel. He wants to have exclusive authority to set up the jurisdiction of the independent counsel. What I am submitting to you is that what the Attorney General wants is to return us to where we were in 1973 when we saw headlines about "Nixon forces firing of Cox; Richardson, Ruckelshaus quit" because they refused to do that.

That is what this is all about. This is not some dry academic legal exercise that we are going through this morning about some dry statute. What we are talking about is the confidence that people have in their government to do justice to high officials who are suspected or accused or where there is evidence of criminal wrongdoing. That is the issue here.

Before 1973, before this independent counsel statute came along, we had the Attorney General picking the person who was supposed to do the investigation of the President's close friends, allies, appointees and family. We decided we didn't want to do that. We did not want the President's appointee, the President's man in this case, to be investigating the President's other people. We just don't want it.

Now, what you want to do is say let's just forget what has happened in the 1970's with that Saturday Night Massacre. Just forget all that. Give us back the appointment power. Give us back the removal power. Give us back the power to set the jurisdiction for the independent counsel. I think you are going to find the Congress resisting that advice.

I am presuming that is what you are advising, because you are not saying that the Attorney General has reached the conclusion that this statute is unconstitutional. That is your opinion. You say he has concerns and he has read the material; he has raised questions and he has read your statement this morning, and he fully concurs in your written statement; that you don't know what his personal opinion is that you gave us orally as your own.

I think we can all say—I don't know what the final bill is going to look like—that is a comprehensive question. But we are going to renew this statute, I think it is safe to predict, and there is no point renewing the statute if we are going to give you back the ap-

pointment power and the removal power which led to the Saturday Night Massacre to begin with.

Mr. BOLTON. Mr. Chairman, let me say as a general proposition, we are entirely committed to the same goal that you are, which is the——

Senator LEVIN. That is the rhetoric. I am talking about the Act. The statute now says the independent counsel must be appointed by a court, because look what happened when the independent counsel was appointed by the President. The President finally found an Attorney General who would fire that independent counsel. He found one. It took him three tries, but he found one.

We don't want that anymore. The public has no confidence in that process, and rightfully so. We don't either. So when you ask to return us to where we were—give the Attorney General the power to pick, the Attorney General the power to fire, the Attorney General the power to control—you are asking for something which is a non-starter around here. It should be.

What you are asking for is not going to happen, I hope and I can safely predict in the Congress. I do not think you should sort of not be direct with us on this question. You might as well state for us the opinion of the Attorney General on the constitutionality, so it is all out there in the record and we can go from there. There is no use saying you have not reached an opinion officially and then giving us your personal opinion, when in fact I think it is clear to everybody, including the last time for reauthorization when the Attorney General opposed the reauthorization of this statute, that the Attorney General feels this statute is unconstitutional.

Why not just say it? If that is his position, why not say it? He has a right to take that position, as foolish a position as it is. He has got a right to take that position. I will defend his right to take it, although I will criticize his judgment for doing it. Why not just say it? Let's go from there.

What is the reluctance? Is it a political reluctance?

Mr. BOLTON. No. No political reluctance at all, Senator. I think our position is exactly what it was in William French Smith's letter of April 17, 1981, where he goes through prior testimony on independent counsel type statutes, the constitutional concerns that were expressed.

Senator COHEN. If I could interrupt, it is exactly as it was back in 1974. Nothing has changed. I disagree with the Chairman somewhat. This is not trying to take us back to anything. The Department of Justice has been there from 1973-74. It is not trying to go back; they have always been there.

Senator LEVIN. In terms of the position of the statute, it would take us back because you want us to gut the statute—there is no other way to describe it except gut the statute.

The statute says a court appoints, not the Attorney General. A court. We have got some confidence in a court appointee. The public does not have any confidence in an Attorney General's appointee investigating the Attorney General or his colleagues or the President's colleagues or family. There is no confidence there.

Mr. BOLTON. Mr. Chairman, what we would like to try to do is fashion a statute that permits as a practical matter an independent counsel to conduct the kinds of investigations that the statute is de-

signed to cover without raising constitutional infirmities that could result in the entire structure of the statute crashing down, to the detriment of the ongoing investigations.

Senator LEVIN. Stripping all that away, you want the right to pick the independent counsel.

Mr. BOLTON. I think, as a practical matter, that if the appointment authority were returned to the Attorney General, that any Attorney General who did not in the appropriate instance, pick a completely unbiased and highly qualified person to serve as an independent counsel would pay an enormous political price.

Senator LEVIN. We have talked a little bit about the issue of intent and I want to go to that, as to how you have interpreted the question of intent.

You quoted from page 30 of your statement where you say, relative to the issue of criminal intent: "The question is whether a reasonable prosecutor would conclude that the circumstances are such as to warrant further investigation into the matter." That is your standard. That is not the statutory standard, by the way—that is your standard—but that is not what I want to go into with you now. I want to go into your own standard, as you phrased it.

How about the situation where a reasonable prosecutor could conclude—could conclude—that the circumstances are such as to warrant further investigation? Not that a reasonable prosecutor would, but that a reasonable prosecutor could conclude.

Would you say then that you ought to proceed?

Mr. BOLTON. Yes. I think that would be the way it was done. In other words, if you could find—

Senator LEVIN. So let me amend now your own standard. It is not whether a reasonable prosecutor would conclude, as you say on page 30, but it is whether a reasonable prosecutor could conclude. Will you agree to that? You will amend your own standard to that degree?

Mr. BOLTON. I would say, Mr. Chairman, I really don't see that there was any intentional difference in the wording. I think it could have gone as you suggested.

Senator LEVIN. Good.

Now, the next question is this: Is the prosecutor in the EPA case not a reasonable prosecutor? Is that what you are saying?

Mr. BOLTON. I am afraid I do not follow your question.

Senator LEVIN. Well, is the prosecutor in the EPA case a reasonable prosecutor?

Mr. BOLTON. I really could not say. I do not know what her—I do not know her personally. I know what her background has been, and I know that she is also representing—even though she is an independent counsel, she is also representing another person in another independent counsel matter.

Senator LEVIN. Are you suggesting here in this testimony that she is not a reasonable prosecutor?

Mr. BOLTON. I am saying I do not have any idea one way or the other. I believe the court—if I could finish—excuse me—the court that appointed her is a very respected court, and I believe they probably satisfied themselves that her qualifications met their standards.

Senator LEVIN. There, in the EPA case, you have a prosecutor picked by a court who has concluded—not who *could* conclude—not who *would* conclude—who *has concluded* that further investigation is warranted; who has asked you to approve her appointment to look into the Schmuts and Dinkins matter, and the Attorney General has refused.

So you are not even following your own standard, unless you are saying she is not a reasonable prosecutor. There you have got a reasonable prosecutor—as much as you will admit, a prosecutor appointed by a reasonable court—who not only would or could conclude that the circumstances are such as to warrant further investigation; she has concluded. So you are not following your own standard, because if that were your standard you would say, “Of course. Go ahead and investigate.”

That is what she has asked you to let her do. You said no. And that is the power you want the Attorney General to have, to control the investigation in order, as you put it—between the lines or on the lines—to make this statute constitutional.

Mr. BOLTON. Mr. Chairman, you are referring to a matter which is under seal at this moment, and I am disabled from testifying as to it because of the order of the court.

Senator LEVIN. You have a lot of testimony in here about Dinkins and Schmuts.

Mr. BOLTON. Yes, from the publicly filed report to the court, where we explained to the court, pursuant to the statute, why we were not seeking the appointment of an independent counsel in that case.

Senator LEVIN. I do not understand that. You testified in this testimony today about that matter.

Mr. BOLTON. We can testify to it because what we have testified to is already a matter of public record.

Senator LEVIN. It is already a matter of public record that you have refused a request to broaden the inquiry.

Mr. BOLTON. I have read newspaper stories about that, but I don't consider that making it a matter of public record.

Senator LEVIN. In other words, it is not a matter of public record that you have refused a request to broaden the inquiry?

Mr. BOLTON. Mr. Chairman, I just cannot comment one way or the other.

Senator LEVIN. Can you say whether or not that is a matter of public record?

Mr. BOLTON. I don't believe I can comment one way or the other. I think the entire thing is still under seal.

Senator LEVIN. My time is up.

Senator Cohen.

Senator COHEN. Mr. Bolton, there has been at least some implication that your resistance to the Independent Counsel Act somehow stems from a desire on your part to return to the days of 1972 and pre-1972. I think that that is not quite the intent of the chairman or certainly is not fair at all.

I think what I have tried to indicate before, that the Attorney General's office, the Department of Justice, has historically resisted any attempt to erode what it sees as an erosion of its authority under the Constitution.

I gather from your testimony you subscribe to exactly that particular view.

Mr. BOLTON. That is correct.

Senator COHEN. What Senator Levin was trying to point out, however, is that the tough decisions on the part of any Attorney General or Department of Justice prosecutor is not whether to prosecute, but when not to prosecute. That is a much tougher decision to make. It is always easy—certainly we have all had experience of going before a grand jury and coming back with an indictment. That is pretty easy to come by.

But the tougher decision for any person to make is, "when do I not go forward?" The reason that we believed at the congressional level that it was important to have somebody outside the Department of Justice, someone picked by someone other than the Attorney General, was to deal with that public perception issue.

You said that any President or any Attorney General would pay an enormous political price if he did not pick a highly competent individual to serve in that capacity. But the fact is that that also might put that so-called independent counsel who is under the aegis and authority of the Attorney General, in the position of trying to demonstrate just how independent he is.

Now that he is perceived as being an employee or agent, of the Department of Justice, he or she might be in the position of showing how independent he or she is by leaning over backwards to prosecute a case that ordinarily, or in a close call, might not have been prosecuted by somebody outside.

That was a policy issue that we took into account. I agree with you; anyone who would fire an independent counsel today would pay a heavy political price. But the fact remains that when the public looks at the appointment of an individual by an Attorney General in an administration in which high-level officials are under attack for alleged wrongdoing, there is almost an immediate cloud hanging over that individual to demonstrate how independent he or she is going to be.

So I think from a policy point of view, this outweighs the Department of Justice's concern for its institutional integrity. But that is a debate that we are not going to resolve here. That is going to continue with this administration, the next administration, the past administration. That goes for Democrats and Republicans alike.

You have indicated in your testimony that you think the independent counsel is being given a blank check. It is much too costly to the taxpayer. Have you got some examples where you feel the independent counsel that have been appointed to date have engaged in either excessively prolonged investigations or excessively costly investigations that would warrant giving the Attorney General's office power of the purse?

Mr. BOLTON. I cannot respond as to what personnel decisions have been made, but I can tell you this: that so far in this fiscal year we have sought reprogramming of \$1 million from the Department of Justice's budget, and we have sought a supplemental appropriation of \$2 million which, very frankly, is a rough guess of what we think it is going to cost.

I would encourage the subcommittee to take a very careful look at the management of the independent counsel offices. For in-

stance, when an independent counsel spends only part time on a matter, and staff as well, the length of time it will take to resolve that matter necessarily grows and grows.

In addition, I think that the independent counsels are just about the only part of the government not subject to Gramm-Rudman. As I say in the testimony, as I think the Supreme Court has recognized, although the Department might like to prosecute every case that comes before it to the fullest, practical resource questions dictate that some of the more trivial matters not be pursued.

While I think the committee took a giant step in 1982 in trying to get the trivial matters out, unfortunately the independent counsel, much as you just said, feel that they have to investigate every single possibility or their performance will be criticized. It is a very great concern to the Department.

I would say one other concern we have is that you want to be sure, in the appointment of independent counsel, that nobody is there trying to make a reputation. You do not make a reputation as a prosecutor by declining prosecutions.

Senator COHEN. Every single independent counsel that I can recall has declined to actually bring back indictments in all the past cases, have they not?

Mr. BOLTON. That is correct.

Senator COHEN. They have still managed to make reputations for their independence by not agreeing to prosecute, even though there might have been heavy political pressure as such, public pressure, to do something about these individuals.

They have not done so.

Mr. BOLTON. I recognize that. What I am saying is that we want to be in a position where the independent counsels already have established reputations within the legal community, and that somebody does not seize on the opportunity to become an independent counsel to make their reputation. We think they ought to have it going in.

Senator COHEN. Don't the courts usually rely upon those highly qualified and high visibility attorneys who have had a lot of trial experience and are well regarded by their peers before they would ever make such an appointment?

They are not out hustling up young attorneys who are eager to go after victims, are they?

Mr. BOLTON. Most of the attorneys, I believe, have been at the peak of their careers. There is at least one I can think of who is relatively younger.

Senator COHEN. Isn't there a danger that if the Department could then have control over the budget, it could also compromise the independence of the counsel?

Mr. BOLTON. I understand your concern on that point. My only point—and the committee tried to do this in 1982—is that you do not want a double standard the other way either. You certainly do not want a standard where high public officials are treated as cronies, and who escape prosecution that the ordinary citizen would otherwise face.

At the same time, you do not want to put the covered persons—and I say this being a covered person myself—you do not want the

covered persons treated to a standard higher than the ordinary person would be treated to.

Senator COHEN. We did that with the amendments in 1982. I think we successfully accomplished that.

Mr. BOLTON. I think you certainly moved a long way in that direction, but the fact is that under present circumstances, even the most trivial allegations are susceptible to being run into the ground by the independent counsel without any resource constraints at all.

Senator COHEN. Would you support legislation that would specify that only reasonable attorneys' fees be reimbursed; that anyone being investigated by the independent counsel who is not indicted could be awarded reasonable fees?

Mr. BOLTON. In the prepared testimony, we responded to a request from you and Senator Levin, we suggest that the statute be amended to provide for the payment of attorneys' fees of an absolved subject at the same rate as is provided for the compensation of the independent counsel; i.e., at a per diem rate not to exceed that provided for Executive Level IV.

We recommend so that, or some mechanism to review the attorneys' fees request and to give us an opportunity to ensure that the interests of the United States are protected, and that they are not excessive.

Senator COHEN. I raise it because there seems to be a reversal of the Department's position because the Department opposed the allowance for reasonable attorneys' fees back in 1982.

Mr. BOLTON. That is correct. As you said in your question, though, it applies only in a situation where the independent counsel is actually appointed. It does not apply in the situation where you have not gotten to that point.

Senator COHEN. I would point out that the Attorney General is the only one that I am aware of that has been reimbursed under the law. I assume that he has been sensitized to the need to have reimbursement of reasonable fees.

Mr. BOLTON. Yes.

Senator COHEN. You are also opposed to the expansion of the independent counsel's jurisdiction or authority investigate certain individuals or new issues, and you feel that this really exacerbates the constitutional infirmities that you see in the Act as it is currently written. Is that right?

Mr. BOLTON. If I could clarify that. If an independent counsel comes to the Attorney General, and requests of the Attorney General referral of related matters, either persons or of issues, we would certainly be willing to consider that.

In the case of Judge Walsh, for instance, we have provided to him information concerning, at this point, some 51 cases relating in some way to the Iran/contra issue, and more may come in as defense attorneys dream up new reasons why their various clients should get off. But we have shared with him everything that even any unreasonable person could say might relate to his jurisdiction, to give him an opportunity to pick and choose from them.

He selected a very limited number and has returned the other matters to us.

Senator COHEN. But if the counsel is not satisfied that you are giving him or her the needed authority to go forward with a further investigation, you do not believe a court should be allowed to expand that.

Mr. BOLTON. That is correct.

Senator COHEN. The bill that I introduced this week would treat the request as a new allegation requiring a 30-day preliminary investigation on which the court would then have to rule.

Would that solve the constitutional infirmity in your judgment?

Mr. BOLTON. If the Attorney General had not already conducted a preliminary investigation as to those particular allegations, it seems to me that it is certainly reasonable to suggest that a request from the independent counsel should be treated seriously, and that some further review inside the Department on a new matter would be warranted. But we would have the same reservation as to judicial review of that second determination.

Senator COHEN. My time is up. Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Senator Cohen.

We just have one more round of five minutes each, given our clock this morning.

You have represented in your prepared statement on page 53 as to the matter involving Theodore Olson, Edward Schmults, and Carol Dinkins, the Attorney General concluded that none of them had ever been subordinates of his.

Is it not true that Ms. Dinkins, one of the three you mentioned, in fact was a subordinate of Mr. Meese at one time in the Justice Department?

Mr. BOLTON. No, because it is my understanding that she resigned. She held two positions in the Department of Justice. She was first Assistant Attorney General for the Lands and Natural Resources Division. She resigned from that post, returned to private practice, and then came back as Deputy Attorney General for about a year.

I believe that she resigned before the Attorney General was confirmed and sworn in. If there was any overlap—and I will be happy to check and get back to you on the precise dates——

Senator LEVIN. I think you better do that for the record because as a matter of fact we believe that she was a subordinate of Mr. Meese from the time that he was confirmed until March of 1985 which was about six months after he was confirmed.

Mr. BOLTON. I believe the Attorney General was confirmed in March of 1985. I say that because he always makes a joke that he was nominated in February and confirmed in March; nominated in February 1984 and confirmed in March 1985.

So, as I say, if there was any overlap——

Senator LEVIN. Will you check your records, please, on that?

Mr. BOLTON. I will be pleased to.

Senator LEVIN. You also state in your prepared remarks this morning that the relationship between the Attorney General and Mr. Schmults was no closer than that of several hundred other acquaintances from college and from law school, pointing out that the Attorney General had met Mr. Schmults when they were college students.

Is it not true that the relationship was a little bit closer than that? As a matter of fact, there had been some transactions and relationships between Mr. Meese and Mr. Schmults when Mr. Meese was at the White House?

Mr. BOLTON. I think we say that in the earlier sentence. In other words, when Mr. Schmults was Deputy Attorney General, as with the other two individuals there, the Attorney General had dealings with them as he has with hundreds of other government officials.

Senator LEVIN. But you say that the Attorney General's relationship with Mr. Schmults was no closer than that of several hundred other acquaintances from college and law school days.

My question to you is, is it not true that Mr. Meese worked with him in the administration, which is a lot different from hundreds of acquaintances from college or law school?

Mr. BOLTON. Senator, there are two points with respect to Mr. Schmults. One is that he knew Mr. Schmults when they were both undergraduates at Yale. In that second sentence that you just quoted, all I am trying to say there is that the extent of that relationship, even though it goes back, is no different from you or anyone else who knew hundreds of people when they were in college and law school.

As to the professional relationship between the Attorney General and Mr. Schmults, that is discussed in the second and third sentences of that paragraph which I would read into the record if you wish.

As to the matter involving Theodore Olson, Edward Schmults, and Carol Dinkins, the Attorney General concluded that none of them had ever been subordinates of his and that he had no personal, political or financial relationship with them that required his recusal.

Performance of their official duties in no way distinguished them from any of the hundreds of other officials of the Executive Branch as to whom the Attorney General could be called upon to make an independent counsel decision.

So in the case of Mr. Schmults, in order to make it perfectly clear to the subcommittee what the relationship was, I separated the personal acquaintanceship with Mr. Schmults from college days from the professional, and I hope I have discussed both of them adequately.

Senator LEVIN. Mr. Bolton, going back to the question of the pre-preliminary investigation period, the statute provides for a preliminary investigation when the Attorney General receives credible, specific information.

In a number of cases there has been a long period of a pre-preliminary investigation. I think you call it an "inquiry."

Mr. BOLTON. That is an informal term that is used.

Senator LEVIN. What is the maximum length of time that inquiry can take? Do you have any internal guidelines that put a limit on that, time-wise?

Mr. BOLTON. No. But I can assure the subcommittee it is not an effort to derail the process. I can give you one example as a hypothetical. If we receive an allegation from a source about someone accepted a bribe, but we have no way at the outset to assess the credibility of the person making the allegation, pursuant to the statute we would want to be able to make that assessment.

It could be that the individual who made the allegation was operating in such circles that verifying the credibility would have to be done in ways, unlike having the FBI go and knock on the doors of his neighbors, as you would in a background investigation for a security clearance.

Senator LEVIN. The question, though, is there any time limit that you impose on yourself? Is there an informal time limit? Days?

Mr. BOLTON. Not in days.

Senator LEVIN. I am just talking about days. There is no time limit in days?

Mr. BOLTON. That is right.

If I could finish with that example, because I think it illustrates the point why it would be artificial to establish a time limit, it just simply may be that even under the most vigorous effort to ascertain the credibility of the source, the methods in which that credibility would be ascertained would be such that they could not be done in 24 hours or two weeks or whatever.

There would come a point, I would think, where we could conclude we just could not assess the credibility of a completely unknown source and at that time would shut it down without going to a preliminary investigation.

Senator LEVIN. In the Whittlesey case, you conducted a six-week inquiry into allegations by the State Department. That is a pretty credible source, it seems to me, the State Department.

Senator COHEN. Not if you are from the Defense Department, it is not. [Laughter.]

Senator LEVIN. With that one minor footnote of Senator Cohen, which I concur in, in the Whittlesey case you conducted a 6-week inquiry into allegations from a credible source—the State Department—about the misuse of funds and improper donations.

You apparently sent a couple of attorneys to Switzerland, France, all over the United States, conducting document inspections and more than 50 interviews. But you are saying that that was not a preliminary investigation; you are saying that was an inquiry in the Whittlesey case.

Now, can you tell me what the Justice Department would have done differently if this inquiry had in fact been a preliminary investigation?

Mr. BOLTON. As we described in our public filing in the Whittlesey matter, when these allegations were received, it was against the backdrop of State Department regulations that expressly permitted U.S. ambassadors around the world to establish gift funds.

Senator LEVIN. I am wondering if you heard my question, though. What did you do differently in this inquiry than you would have done if it had been a preliminary investigation? That is my question.

Mr. BOLTON. What we were attempting to do in this very preliminary stage was ascertain whether there were specific and credible allegations as to all of the elements of an alleged crime. As we have discussed before, one of those is criminal intent.

Senator LEVIN. What investigative steps would have been different if this had been a preliminary investigation rather than a period of inquiry?

Mr. BOLTON. I am not sure it necessarily would have been different, but what we were trying to find here was whether the statute itself was triggered; whether there were any crimes that were violated at all. As I have mentioned in the prepared testimony and in some earlier examples today, there are instances where allegations of behavior do not rise to criminal violations even if every allegation about them is correct.

I might add also that the conclusion that we reached in Phase I, if I could call it that, of the Whittlesey inquiry—that is, that there was no criminal intent—was exactly the same conclusion that Congressman Mica reached after some eight hours of interviews with the ambassador.

As to the second part—and I don't believe you have mentioned this so far—we did trigger a preliminary inquiry as to the allegations of construction.

Senator LEVIN. I did mention that in my opening statement.

My five minutes is up.

Senator Cohen.

Senator COHEN. Mr. Bolton, you indicated on several occasions that there are three basic objections you have to this law, one with respect to the appointment process; number two, the control of the independent counsel; number three, the removal of the independent counsel.

We have talked a little bit about the expansion of jurisdiction and so forth and how that might be more refined or perfected. The appointment process we are never going to resolve until the court ultimately comes down one way or the other on the constitutionality of the bill itself or the law itself.

But let me talk about the removal process. You have said that you think that the constitutional infirmity is greater on the issues of control and removal than on the appointment process. Is that right?

Mr. BOLTON. That is correct.

Senator COHEN. The basis of the removal is for good cause, which changed in 1982. It used to be extraordinary impropriety. Now it is removal for good cause. Right?

Mr. BOLTON. That is correct.

Senator COHEN. In 1982, then Associate Attorney General Rudolph Giuliani stated that such a removal standard would make a special prosecutor no more independent than officers of the many so-called independent agencies in the Executive Branch and would, in all likelihood, insulate this legislation from constitutional attack in this respect.

Now, do you disagree with this statement by the Department just 4 years ago?

Mr. BOLTON. I don't think it would insulate the independent counsel, I don't think it would insulate it from constitutional attack if it were construed that if the President gave a direct, lawful order to the independent counsel and the independent counsel refused to abide by that order, that that refusal would constitute good cause.

If the statute were interpreted that way, then it could be saved from constitutional infirmity. If it were not interpreted that way

by a court, then you would have limited the President's removal power in a way that we think would be unconstitutional.

Senator COHEN. Let me just clarify that. If the President were to give an order, a direct order to the independent counsel and the independent counsel were to disobey, refuse to obey that particular order, that in your judgment would be reasonable grounds for removal?

Mr. BOLTON. Yes.

Senator COHEN. But that, in effect, nullifies the whole purpose of having an independent counsel, doesn't it?

Mr. BOLTON. No. What we are trying to do is save the statute by a construction that admits of a constitutional interpretation that the President's removal power of officers of the United States is unlimited pursuant to the "Decision of 1789," where the very first Congress debated and discussed whether or not there could be limitations on the President's removal power as to officers.

Senator COHEN. So under your interpretation, a court would have no discretion to examine the nature of the request made by the President.

Mr. BOLTON. Assuming that the order by the President was a lawful order, yes.

Senator COHEN. Well, if the President has absolute authority over all the employees under his jurisdiction, there is no improper order that he could possibly make, unless it is illegal. Is that correct?

Mr. BOLTON. If he issued an illegal order, there would be a question then, even so, if an officer of the United States could be retained.

Senator COHEN. Suppose the President just says, "Mr. or Ms. Independent Counsel, I want you to cease and desist from going on beyond the examination of the following issue. Do not extend this beyond the person you are currently investigating." And that independent counsel says, "I am sorry, Mr. President; it is very clear from the evidence that there are a number of people who are close to you who are also similarly involved."

He could be, or she could be removed under those circumstances?

Mr. BOLTON. I think that would be a lawful but highly unwise order.

Senator COHEN. I am not talking about wisdom. I am talking about the standard of reasonable grounds. You indicated before, any lawful order by the President would be grounds for removal if disobeyed.

Mr. BOLTON. That is correct.

Senator COHEN. So even though politically unwise, a directive were given, if that independent counsel refused to abide by that, he or she should be subject to removal?

Mr. BOLTON. That is correct.

Senator COHEN. As a matter of practice, then, or policy, there is no independence of that counsel beyond that of the President's power.

Mr. BOLTON. We don't think there can be constitutionally, but I think that the practical politics of what would happen if a President removed an independent counsel in those circumstances are such that as a matter of real politics, that a President would be in-

viting disaster for himself if he were to fire an independent counsel under those circumstances.

Senator COHEN. Thank you very much, Mr. Bolton.

Senator LEVIN. I have just two more questions. One is on the court cases in *Banzhaf*, *Nathan*, and *Dellums*. In all three of those cases—and that is the entire body of court decisions that we have that are printed so far—the courts found that the Attorney General's conclusion that the information provided by the plaintiffs was not specific or sufficient was an unreasonable determination. In the case of *Dellums*, "was wholly unsupported by the record"—that's what the *Dellums* court said.

In the *Banzhaf* case, it said that the Attorney General's determination "is without any reasonable basis" and that "the Department of Justice appears to have simply ignored the requirements of the Ethics Act."

In the *Nathan* case, it says that—these were all different courts, I believe—but in any event the court said, "Contrary to defendant's claims, the information submitted to the Attorney General appears sufficiently specific to require investigation."

I know that these cases were appealed on procedural grounds, and you argue that you could not be forced to do this by that plaintiff. There was no standing and you had a right to do that—the Attorney General has the right to appeal on procedural grounds—no one is arguing that.

But we have three courts on the substance saying that you had the specific, credible evidence to proceed to an investigation. That is all we are talking about—we are not talking about an indictment—we are just saying that you had specific, credible evidence according to these courts. Those findings were undisturbed on appeal—you had specific and credible evidence in all three cases to at least proceed to an investigation. And, if you did, then you would be accountable—you would have had to report to a court as to what the outcome of the investigation was.

My question is why, when you have presumably reasonable courts—not to use your term, reasonable prosecutors—but here reasonable courts finding that there was specific, credible information and that you were unwarranted in not moving to the investigatory stage, why didn't you just simply move to the investigatory stage?

Mr. BOLTON. In those three cases, as you correctly state, all three were reversed on appeal, and they were reversed on appeal, not on the merits, because we never felt that it was necessary for the courts to reach the merits; but because of the decision of the Attorney General not to go to a preliminary investigation and seek appointment of an independent counsel, constitutionally cannot be reviewable.

As to the judges themselves who were involved, I am not going to comment on their actions in the decisions in those cases, which I think were clearly wrong.

Senator LEVIN. So those findings of those courts which were undisturbed on appeal—

Mr. BOLTON. Undisturbed because the court of appeals in all three cases never needed to reach that issue, having found that the Attorney General's decision was not—in other words, I do not want

the implication left in the record that the courts of appeals approved of what those three district courts said.

Senator LEVIN. I never said that. I was very careful when I said they were undisturbed, but you did argue the merits in the trial court that your finding was a reasonable one, didn't you?

Mr. BOLTON. I would have to go back and look at the briefs. It is conceivable that we argued only the ripeness and reviewability issue.

Senator LEVIN. I find it difficult to believe that three district courts would reach a conclusion that you were unreasonable in your conclusion not to proceed to an investigation and that that was an unwarranted violation of the Ethics Act, if in fact the issue was not before them.

I have a lot of trouble believing that three courts out of three would reach that decision, and I would appreciate your checking your briefs and letting us know whether in fact you did argue the reasonableness of your finding of lack of specific, credible evidence in each of those three cases.

Mr. BOLTON. I would be happy to do that.

Senator LEVIN. Thank you very much, Mr. Bolton. We appreciate your being here, and your summarizing your testimony as you did was helpful to the subcommittee.

Mr. BOLTON. Thank you.

Mr. Chairman, if I could just say one more time, we are anxious to work with you and the other members of the subcommittee to see if there is not a mechanism to create an independent counsel that would not raise these constitutional questions and not jeopardize investigations that may be conducted in the future.

Senator LEVIN. Well, we are glad to have that commitment on the part of you, Mr. Bolton. It is important that we preserve an independent counsel in fact as well as in name. There is no doubt that the Attorney General—Senator Cohen is, of course, correct on this—the Attorney General's office over the years has raised these questions of constitutionality. This is not the first Attorney General to do this. The Attorneys General before this Attorney General, at least in one case, have also questioned the constitutionality of the statute. Nonetheless, the outcome and effect of what, as you propose it here, seems to me wanting to maintain the right of appointment, the right of firing, and the right of control—that position, and it is a consistent position, would return us to some very dark days.

Thank you, Mr. Bolton.

We now call as our next witness someone whom I know personally from my days at Harvard Law School. I will add a personal welcome before I say what the public knows about him, which is that he is the former special prosecutor during the Watergate matter. He was fired by President Nixon. He was a major contributor to the formation of the independent counsel statute. He is the chairman of Common Cause. He is professor of law at Harvard University and as distinguished a person as one could want to appear before this or any other committee. We want to welcome Archibald Cox.

Professor Cox.

TESTIMONY OF ARCHIBALD COX,¹ PROFESSOR, HARVARD
UNIVERSITY, AND CHAIRMAN, COMMON CAUSE

Mr. Cox. Thank you, Mr. Chairman and Senator Cohen. I appreciate your generous words. If I may strike a personal note, it is a pleasure to see both of you again.

I greatly appreciate this opportunity to appear on behalf of Common Cause, to urge the subcommittee that Title VI, the Independent Counsel provisions of the Ethics in Government Act should be reenacted and strengthened in some respects that I shall suggest.

May I also say that we greatly appreciate the work that the committee has done, under you, Senator Levin as chairman, and previously under Senator Cohen. This is a field that Common Cause is intensely interested in. All its members appreciate the attention you have given this problem.

My statement has now been filed. It is divided into seven parts and I will try to summarize each of them, giving a little more attention to some parts than others.

First we address the question of constitutionality. It is my considered opinion that Title VI is constitutional as written and that the courts will uphold its constitutionality. I think Congress has ample constitutional authority under three heads.

First, there is no doubt of the power of Congress to create offices, to create this office, and to provide for the appointment of independent counsel by a court of the United States.

The Act does create the office. It defines it in Section 592 as precisely as any advanced definition of the work can be written. And under Article 2, section 2, clause 2, Congress may by law vest the appointment of such inferior officers—everybody agrees that independent counsel are inferior officers in the Constitutional sense—vest the appointment of such inferior officers as they think proper in, among others, the courts of law.

The Supreme Court indicated in the Siebold case over a century ago that those words should be given their full meaning, except possibly in the case, the very limited case, where making certain kinds of appointments was incongruous with the performance of normal judicial duties under Article 3. It found no incongruity in appointing officers of elections. Certainly there is no incongruity in appointing an attorney, subject to the discipline of the court, to conduct an investigation and, if appropriate, submit the matter to the court.

Attorneys are under judicial supervision. Courts not infrequently appoint attorneys to prosecute criminal contempt. Under existing statutes for many years, they have appointed attorneys to fill vacancies in the Office of U.S. Attorney.

Second, we think that it is quite clear that Congress has power to make the independent counsel, entrust it with an investigation, and if appropriate, prosecution independent of the day-to-day supervision of the President or his appointee, the Attorney General.

As far back as *Kendall v. United States* in President Jackson's administration, the Supreme Court described as alarming the idea

¹ See p. 186 for Mr. Cox' prepared statement.

that Congress cannot impose upon any Executive officer any duty they may think proper and in such cases the duty and responsibility grow out of and are subject to control of the law and not to the discretion of the President.

In the *Humphreys* case and again in *Wiener v. United States*, the court indicated that it was proper for Congress to make inferior officers free from the day-to-day supervision of the President when the tasks of the officer require freedom from Executive interference and when the officer must, from the very nature of its duties, act with entire impartiality and not be open to suspicion of partisan direction.

The necessity of freedom from suspicion of partisan direction and need for acting with entire impartiality arise from the very nature of the duties of an independent counsel, because for reasons that the chairman and you, too, Senator Cohen, so well stated at the beginning of the hearing, the most important quality our government can have is citizens' trust in the integrity of high Executive officers and the assurance that if they have violated a law, they will be investigated and, if appropriate, prosecuted with complete impartiality, freedom from any suspicion of partisan direction.

That cannot exist if the President is free to direct the independent counsel because the conflict of interest is immediately brought back into play. There is too much danger that his directions will be influenced by personal or political considerations where this limited class of high government officials is involved.

The only way to give that kind of assurance to the people of the country is to be sure that the President cannot intervene. If I may be forgiven a personal note, I thought that Mr. Bolton's testimony toward the close gave a perfect example of the problem. He said that the President should be free to dismiss any independent counsel or special prosecutor who fails to follow his explicit instructions.

Let's suppose that the President gives explicit instructions not to challenge a claim of executive privilege, not to seek to subpoena evidence from the White House. If independent counsel must obey that or be dismissed, there cannot be any assurance that the investigation will be pursued impartially and uninfluenced by political or personal considerations. And, of course, we know that can happen because it did happen in just about the terms I have stated it.

The cases that are chiefly cited to sustain the claim of unconstitutionality—*Myers*, *Buckley*, the *Gramm-Rudman* case, are all readily distinguishable. They all deal with various sorts of congressional attempts to intrude congressional control into the realm of the Executive. They have nothing to do with giving independence to an officer, complete independence from both presidential and congressional control where the nature of his duties requires it.

Finally, the *Humphreys* case and the *Wiener* case again hold that where freedom from Executive direction, Executive influence is required, then Congress may by law make the officer not subject to discretionary presidential removal, but limit the grounds for removal to just cause or good cause or some similar standing.

Of course, that ground for removal exists under the legislation that this committee has drawn.

I should also point out that the independent counsel is not under the statute allowed to be entirely freewheeling. With respect to his decisions, policies, he is charged with applying the normal policies and rules of the Department of Justice. So in that respect he is not yet unlimited.

Now, a second point. We urge the need for reenactment of the statute. I would suggest it be without limit of time. The reasons in principle were very clearly stated as the chairman opened the hearing. I suggested before the assurance of integrity on the part of high government officials and the assurance that equal justice be applied in the case of wrongdoing on the part of high officials or suspicion of wrongdoing on the part of high officials, without favor for personal or political reasons, is essential to maintaining public confidence in the integrity of our government.

It is not enough simply to rely on political pressures, when someone is subject to a conflict of interest, not to let the conflict of interest influence him. The practical need to renew the Act is demonstrated by events.

For the past 6 years, if my count is correct, there has been need for six independent counsel, a bigger number I expect than anyone anticipated.

The letter from you, Senator Levin, and you, Senator Cohen, addressed to me, asked whether the procedure established by Title VI is preferable to a system in which the Department of Justice hires individuals to conduct investigations in prosecutions of high level officials.

I would say it was infinitely preferable for reasons that I will not elaborate because they have already been stated.

First the conflict of interest. The cases under sections 591 and 592 that inevitably cast doubt on investigation and prosecution by the Attorney General preclude leaving the decision to appoint an independent counsel to his discretion. The same conflict.

Again, there is too much danger of public misgivings if an officer who is in a position of conflict lessens confidence in the detachment and impartiality with which the choice is made.

Third, it is not possible to secure complete independence, for one, a prosecutor selected and appointed by the Attorney General, because he can always be removed. And indeed we know that the Attorney General claims that he must always have the power to remove him for doing things that he or the President does not want done.

In effect, Mr. Bolton has said we are for renewal of the statute, in the chairman's phrase, with the guts taken out.

Fourth, this is a relatively minor matter. It seems to me that it is desirable to have the division of the court decide in such cases what papers should or should not be made public. But that is a minor concern.

In the third part of our statement we develop what seemed to us to be the Attorney General's misapplication of both statutory standards—of the standard relating to conducting a preliminary investigation and the standard relating to whether he will ask for the appointment of a independent counsel.

The examples we give in the statement are those already discussed, and I would simply add a few words. It seems to me that in

the case of the gifts to the fund of Ambassador Whittlesey and the appointment of the son of a family that had made a gift, that the Attorney General did everything to conduct a preliminary investigation except put that name on it.

It also seems to me perfectly clear that he had credible evidence and that it was specific evidence and that under those circumstances it was his duty to conduct a preliminary investigation and not to call it something else while he did it.

The significance of course is that if he calls it something else, then he takes himself out from under the statute, does not file the required notification and report, and the public, congressional committees and the like don't know what has occurred.

There is another standard relating whether there is cause for further investigation—if there are reasonable grounds to believe that further investigation or prosecution is warranted. It seems to me that that has been misapplied so far as we can tell from the reports filed in the *Whittlesey*, *Schmults* and also the *Dinkins* cases.

It is not an easy problem. The committee when it wrote this reasonable grounds standard pretty clearly articulated what it was getting at. I think it was best put by the subcommittee. It said the reasonable grounds language would in the subcommittee's judgment strike an appropriate balance between the need to permit the Attorney General to exercise limited discretion in evaluating the results of the preliminary investigation and the need to establish a standard that is not so high that the Attorney General would be making decisions best left to the special prosecutor.

The subcommittee said that it should not be interpreted as allowing the Attorney General to establish definitely whether or not prosecution is warranted.

I think that what lies behind the whole statement is that the Attorney General's political and personal interests are involved when other individuals high in office of the same administration are suspected to be disqualified from making those prosecutorial judgments which are or may seem to be influenced by his personal or political interest.

Decisions covering credibility, motive, intent, a kind of overall judgment which the Attorney General made according to the reports in the *Whittlesey*, *Schmults* and *Dinkins* cases is exactly the kind of judgment from which it is almost impossible to exclude your personal opinion of the individual, the past associations with the individual, and other intangible factors of that kind.

No man who is sensitive to the problems of conflict of interest, I think, could feel that it is proper for me to say where I have this conflict, where I have even recently been entertained by the ambassador, that my judgment is free from undesirable risk of undue influence. A man does not know. He may go at it with the best intent in the world, but that danger is there. The law has always recognized that.

Even if he acts correctly, there is always the public uncertainty that grows out of an appearance of conflict of interest. That may be unfair to the individual concerned—in this case the ambassador—or it may be that an unwarranted benefit has been conferred in freeing the individual from further investigation.

My written statement, Mr. Chairman, sets forth those points a little more precisely.

I have not been able to come up with any suggested statutory language that would meet this problem. I think what is required is for the committee, the subcommittee first and then perhaps the full committee, if they agree that the standards have been misapplied in both instances, should set that forth and set forth the reasons in its report. Then for the future there would be specific illustrations of how the subcommittee expects the standard to be applied, and reenactment following the giving of those illustrations would supply guidance in the future.

Now, if somebody else can come up with better words, of course, I would applaud it. But I must say candidly I have not been able to develop any.

The fourth point the statement covers is our submission that the court should be given express power to enlarge the existing jurisdiction of independent counsel upon his or her request. Whether the court has that authority or not seems to me to be unclear on the words of the statute, and I have set forth the reasons in the statement.

It seems to me clear that the court should have that authority upon the request of independent counsel and that the Attorney General who is required by the statute to stand aside, should not be in a position of blocking independent counsel from going into a matter that independent counsel's investigation indicates is sufficiently related to its initial jurisdiction to warrant combining inquiry into it along with inquiry into the initial jurisdiction, more narrowly defined.

There are often things evolving, related events, related defenses, persons acting in association with those originally named that develop during the course of the investigation. Both impartial justice and economy of resources dictate that those should be combined under one heading.

I have suggested language in the written statement but I will not stop to read it.

Fifth, we think that the powers and duties of independent counsel should be increased by requiring—when he uncovers evidence giving reason to believe that there has been a non-criminal violation of an established code of ethics applicable to government employees in this category—him to report that evidence to the appropriate officers, inspectors general, or agencies, the Office of Government Ethics, for them to take appropriate action to follow it up.

Under the present law, one independent counsel, Jacob Stein, interpreted his authority as not extending to taking any further action. I think it would be inappropriate for a prosecutor to have the authority to make findings on that, or inappropriate for him to investigate more broadly whether there has been a non-criminal violation.

But if, as an incidental matter, he comes upon non-criminal violations of established standards, that in the case of this category of officials, it should not be left to drop.

Two things, perhaps three, would come about from such a change. First, the importance of ethical standards would be reemphasized. Second, there could be no misunderstanding that the

report of independent counsel is a complete exoneration and confers a stamp of approval to continue in office upon the individual concerned. And, third, having in mind that we wish to be fair to the individual, it would facilitate his being cleared of the ethical violations, the taint, if suspicion is warranted.

Again, there is appropriate language, I hope.

Two more little points, very little. Next we suggest that the section of the statute dealing with oversight should be amended so as to make it clear that the appropriate committee—in the statement I say the Judiciary Committee—perhaps it is this committee—but that the appropriate committee should have jurisdiction over Department of Justice files, cases handled under section 592, that the committee has in the case of other closed criminal files upon the same terms and the same conditions.

I think there is some chance that it could be read that committees are not entitled to files in these categories and that would seem to me unfortunate. They ought to be treated in this respect just like others.

Finally, we are concerned by the risk that major questions of law of great public importance and great public interest may be thought to come before the Independent Counsel division of the court and argued, decided, in secret.

It seems to us that it must be possible without invading the privacy of any individual, giving out things that might unfairly damage reputation and privacy, for the court to give enough information to enable the public to know and discuss what the question is and to enable interested parties to seek leave to file amicus briefs.

I do not think anything more is required than again for the subcommittee to mention this in its report—that the problem is brought to the attention of the Independent Counsel Division.

That completes my summary, Mr. Chairman.

Senator LEVIN. Thank you very much, Professor Cox, and thank you for the great effort that you made to be with us today. That also is much appreciated.

Professor Cox, were we to adopt the position of the Department of Justice as they state it today, would we be in any different shape than we were in in 1973?

Mr. Cox. I would think just the same shape, so far as I can see.

Senator LEVIN. Is there any difference in your opinion, constitutionally, between a special court's authority to establish the jurisdiction of the independent counsel at the outset, versus expanding the jurisdiction after the independent counsel has been appointed?

Mr. Cox. I do not think so. I think that the duties of this office are indicated by the statute; that the provision authorizing expansion of an independent counsel's area into related matters would be sufficient definition by the Congress that the court really would just be applying the definition supplied by law to the particular fact.

I was trying to think of an example this morning. It occurred to me that suppose there was need, although it would be rare, for an inspector of lighter-than-air aircraft. Well, you do not need somebody permanently in that job, so far as I can see. If the need arises because dirigibles are built, then Congress would authorize the De-

partment and somebody would instruct the person appointed what dirigibles he was to inspect.

If he was instructed to inspect A, B, and C and then a C-prime comes along, it is still within the general kind of jurisdiction defined by law.

It seems to me that we are talking about the same thing here as in that simple example. A standard, a legal standard of what the man is to do is defined by the statute. It is simply a matter of identifying the instances that fall within the definition that a particular person in the Office of Independent Counsel is to deal with.

Senator COHEN. Professor Cox, you were not intending any political statement by drawing the analogy of a dirigible filled with hot air and the administration's practices, were you?

Senator LEVIN. You can take the fifth on that one if you want to.

Mr. Cox. There is a nice question, Senator, as to what individual we should apply the analogy.

Senator LEVIN. I am just going to ask you one more question. We are going to follow a five-minute rule on this round, given the time.

In your testimony you raised some of the same questions that we have been raising about how the Justice Department has been implementing the existing Act. You may have commented on this, but I want to make sure I understood you if you did, and if you did not, perhaps you can make it clear now.

Do you think we should amend the statute to set a time limit on the pre-preliminary stage? This is a stage that no one knows how long it lasts; we do not know whether it is taking place; we do not know whether it has begun.

Under existing law, if we cannot find out—there are a number of occasions I have asked the Attorney General, for instance, “are you involved in an inquiry,” and we could not get an answer.

So my question is, should there be some kind of a time limit on that pre-preliminary stage or inquiry stage?

Mr. Cox. Again, if one could come up with more precise words. I would have thought the statute's purport was very plain: a preliminary investigation shall be conducted when specific information which is credible in the sense that there is no reason to distrust it is received.

Certainly in the cases we have been dealing with, there is no doubt about some date of receipt and when it is specific. The information may not cover all the elements of the crime and, of course, need not cover state of mind, but the date is fairly easily fixed. If you could think of some other way to word the requirement, I would favor it because it would close what has been an avenue that came close to defeating one of the purposes of the Act—the filing of a report.

Happily we did get the information, but it was chance.

Senator LEVIN. Thank you.

Senator COHEN.

Senator COHEN. Thank you, Mr. Chairman.

I am not sure that I would agree that we need to have some specific time frame in which to operate, but it raises the question, Professor Cox, did we make a mistake back in 1982 when we added the word “credible source”?

Prior to that time we simply had to have an allegation, a specific allegation about an illegal activity. That was the law as written in 1978. In 1981-82 we conducted oversight hearings on the law, saying perhaps that the law was a bit too stringent, and therefore we gave the Department of Justice a little more flexibility to determine the reliability or credibility of a source from which the allegation is made.

That, in turn, has been expanded by the Department of Justice to say we need to make a pre-preliminary investigation into the credibility of the source before we can decide whether or not we are going to have a preliminary investigation.

So the question I have is, wouldn't at least a cleaner way of dealing with the issue, although perhaps more punitive, be to take out the credible test that we put back in 1982?

Mr. Cox. Go back to when a charge is filed.

Senator COHEN. Right.

Mr. Cox. Well, it would certainly be more precise. The worry, in all fairness, is suppose that a charge is filed which shows on its face it comes from someone who is not technically mentally competent, subject to that kind of characteristic.

Then I would say it will not hurt for there to be a preliminary investigation because it will be quickly dismissed in the preliminary investigation. That may be.

Senator COHEN. Well, we tried to weigh that. That was the issue we were trying to deal with in 1982, to take into account this issue of equity involved. Is it fair to individuals who are the subject of an allegation, who just, by virtue of their position, are subject to all sorts of allegations? Would it be unfair to constantly subject them to the threat of an investigation if someone who is totally lacking in credibility makes an allegation which accuses them of wrongdoing, to trigger an automatic investigation?

So I think we did the right thing in 1982 by putting that credibility or reliability test there. I do think, however, that the Department of Justice has now extended that into an entirely unforeseen field as far as we are concerned by using that credible test as an excuse, or at least a rationale, for conducting a sort of pre-preliminary investigation.

Mr. Cox. I think I agree with nearly all your last statements, Senator. Maybe I misunderstood you earlier.

I think I would leave this part of the statute as it stands. I would make it clear that in my judgment the Attorney General in the Ambassador Whittlesey case totally misapplied the standard in the statute as it stands.

I would add to what I have said in the statement, having heard the discussion, that when I used the word "credible," I did not mean this far-flung investigation on two continents into whether the allegations were or were not true or would or would not be found true by a jury. I meant to allow the Attorney General to dismiss things which were clearly unbelievable on their face or in terms of very obvious close, direct circumstances that hit you in the face, and that it did not involve a long investigation into who are you going to believe with opposing witnesses.

Senator COHEN. What is your opinion about the use of this pre-preliminary investigation stage to determine criminal intent?

Professor Cox. I think that, as you suggested earlier, the Department should start using some phrase other than "criminal intent." Different statutes involve different kinds of intent.

The phrase "criminal intent" suggests that perhaps motive or passion, as in the Whittlesey case, has been taken into account, things that are not really part of the statute.

I would think that criminal intent need not be demonstrated to move to the preliminary investigation stage. The Attorney General should not make a judgment on that.

I think it is fairly apparent that when the committee spoke of credible evidence and specific evidence, it meant that if specific acts are charged violating a statute, and they do not come from an obviously unbelievable source, then you go to a preliminary investigation. That is the meaning that makes sense in what is trying to be accomplished.

I would also add, Senator Cohen, that I think—a reason stated in our statement—that decisions concerning state of mind, inferences drawn by a possibly guilty individual, are the very kind of question that an Attorney General, who by hypothesis is subject to a conflict of interest, should not be making without investigation and a judgment by independent counsel.

Why? Because I would say to myself, this is the very kind of judgment in which I am most likely to be influenced by my prior knowledge and association with this person or by the knowledge and association of others in the administration with whom I have confidence. It is the very kind of thing that I ought to stay away from.

I think that the committee reports make it very clear that that is the kind of thing that the statute intends him to stay away from.

Senator COHEN. My time is up. But you would apply the same test to the so-called—if I can recall from my law school days—*malum prohibitum* type of crimes?

Mr. Cox. If the statute prohibits doing certain things and state of mind is not an element of the crime, then, a fortiori, the Attorney General should not.

Senator COHEN. And if it is *malum per se*, what about that?

Mr. Cox. If it requires an intent to do the act that the statute prohibits, if that intent—if the act is one that must be done knowingly to be a crime, I would apply my standard. I would say that drawing this kind of inference about state of mind is something inherently subject to extraneous influence. Whether the jury will find intent or not find intent is nothing that I should be deciding because, try as I will, I cannot be sure of making a completely impartial judgment.

Senator COHEN. Thank you very much.

Senator LEVIN. Thank you, Senator Cohen.

For those of you in the audience who may not know what a *fortiori*, *malum per se*, *malum prohibitum* are, Professor Cox has agreed to hold a special seminar immediately following this hearing.

Mr. Cox. I must say I was seduced by the reference to law school days.

Senator COHEN. I do not get a chance to use my Latin degree very often.

Senator LEVIN. It was impressive. I had forgotten those words.
 Senator Heinz.

OPENING STATEMENT OF SENATOR HEINZ

Senator HEINZ. Mr. Chairman, thank you.

First I would ask unanimous consent that my statement be made part of the record.

Senator LEVIN. It will be.

[Senator Heinz' prepared statement follows:]

PREPARED STATEMENT OF SENATOR HEINZ

First, I would like to commend Senator Levin and Senator Cohen for their leadership in bringing the need for reauthorization of the independent counsel statute to the Committee's attention at this time. We need to consider fully the implications of the many cases involving independent counsel that have recently attracted the Nation's attention.

Public confidence in the integrity of high-level government officials is fundamental to our democracy. The independent counsel statute, as part of the Ethics in Government Act, assures independent, unbiased investigations of criminal wrongdoing. We all remember the "Saturday night massacre." Indeed one of our witnesses has first hand knowledge of it.

Independent counsel have served our system of justice well over time. Today, the constitutionality of their appointment is being challenged by those who would pick at the seams of the law. I would note that the statute wisely protects the President and his officials from unwarranted and prolonged investigations, just as it provides fair and unbiased means to reveal the truth.

It is very likely that the Supreme Court will be asked to rule on this issue before the end of this year. As a member of the Subcommittee, I await any opinions made by the Court; however, many scholars that will appear before us both today and tomorrow firmly believe that this statute is consistent with the letter and spirit of the Constitution. Shades of gray may need to be examined in the light of recent events, but its constitutionality and the validity remain unchanged.

Senator HEINZ. Second, I must say that as a non-lawyer, I feel like I am back on the Judiciary Committee in 1977 when I became the first non-lawyer in modern times ever to serve on it. I feel I have taken a step back, at least in history.

It is, however, quite an honor to have Professor Archibald Cox before the subcommittee. I am not going to ask lawyers' questions because I am not a lawyer, although I will go to the Latin dictionary, Bill.

Senator COHEN. Your time has expired, Senator Heinz.

Senator HEINZ. Thank you, Bill. [Laughter.]

I just want to make this comment; that this hearing is quite timely. All of us picked up the front page of the Washington Post to see where Mike Deaver had been indicted, as I understand it, for perjury in the course of an investigation involving influence peddling, as is the impolite name for it, I believe; violating the conflict of interest statute.

It is worth reflecting on the fact that here is an individual which many of us have come in contact with, who served our President very loyally and well. Some people even surmised that had he continued to serve the President, some of the things that happened to this President in the last year or two might not have happened to him.

He has a family, a wife; he has children who are obviously as distressed by what he has been going through as anybody can be. And a judgment of guilt or innocence will be forthcoming in due course.

The fact is that were what has taken place to go no further, or if tomorrow somebody should decide that Mike Deaver was innocent, nonetheless what has been experienced by him and his family is probably a very substantial deterrent, let alone if he is convicted, to anybody in public life who believes for one moment that the laws that we have passed we do not mean to enforce.

It is that sure enforcement that the independent counsel process provides that should be a very important, useful, and far-reaching reminder to any present or—probably more important—future public servants.

They are on notice very clearly, very forcefully, that there is a standard to which they should and must be held. It is also a reminder, I think, to those of us who write these laws. I have never known, in the 15 years I have been in Congress, or seen us write anything that does not look like a good law. It does not always work that way, but they always look good because we are attentive to those appearances. We need always to be mindful that we must write the very best in the way of laws, regardless of the PR of those laws. They have to work well; they have to be considered judgments. They have to be reasoned. They should not grow out of frustration or reaction.

Mr. Cox, I do not really have a question for you. I do not know enough Latin to ask you a good question, but I think that your testimony in support of the statute is most welcome.

Thank you.

Mr. Cox. Thank you.

Senator LEVIN. Thank you very much, Senator Heinz.

Mr. Cox, again our thanks to you both for your testimony and what you have meant to this country for many, many years and for your making this special effort to be with us today.

Mr. Cox. Thank you very much, Mr. Chairman.

Senator LEVIN. Our next witness is Alan Morrison who is Director of the Public Citizen Litigation Group, lead attorney in the Supreme Court cases striking down the one-House legislative veto and portions of the Gramm-Rudman-Hollings balanced budget law—both of which we were on the opposite side of—and a very respected litigator indeed, and a very successful litigator in the area of separation of powers.

Mr. Morrison, we particularly want to welcome you here. I think we may be on the same side of a situation for a change. You are most welcome to the subcommittee, and you are free now, if you would, to summarize your testimony. Given the hour, we would most appreciate that.

TESTIMONY OF ALAN B. MORRISON, DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP

Mr. MORRISON. Senator, thank you. I am pleased to be here. I would just say that we probably are on the same side of a lot of other cases, particularly the impoundment cases in which we have been trying to prevent the Executive Branch from usurping congressional power.

Senator LEVIN. I am batting 500 with you then. Thank you.

Mr. MORRISON. I have the luxury of not being part of the Executive, Legislative, or Judicial branches and therefore I can look at the separation of powers issues in a way that does not depend upon my particular bias as to what the decisions are going to do to affect my own personal job.

In my view it is terribly important we look at separation of powers questions in terms of the purposes for which that doctrine was created. I want to make just a couple of points regarding that today in support of my view that the independent counsel statute is constitutional.

First let me note an irony that I found here today. Although Mr. Bolton said that he and the Department were all strict constructionists, I have found it rather surprising that they took positions today that made it difficult to "take care that the laws shall be faithfully executed," which is the part of the Constitution that they are always citing.

In the first place it seems to me that they have gone out of their way to find constitutional infirmities that are not there. And second, they espouse a view of independent counsels that will make the independent counsel not independent and therefore we will have less likelihood that the laws shall be faithfully executed and that people like Michael Deaver will be indicted and brought to trial and either found guilty or acquitted.

Beyond that irony in their position, it does seem to me that, as Professor Cox pointed out, in every single case in which there has been found to be a separation of powers violation, there has been a substantial intrusion by one branch of government upon the operation of the others. That is surely true in the legislative veto case and in the Gramm-Rudman case and in a number of others that predate those.

Indeed, even in the case of *Myers v. United States* on which the Justice Department so heavily relies, that case, although containing a large amount of dicta about the President's authority, involved a statute under which the Senate retained the control through the power to veto any firing by the President. That was the operative holding of that statute and while there is a great deal of other discussion, it seems to me that that is an important fact to keep in mind.

Moreover, in all of the rest of the cases, there was an activity undertaken by one branch of the government that was not specifically authorized by the Constitution. Here, by contrast, we have no intrusion, and we have a specific authorization for courts of law to appoint inferior officers of the United States.

Second, I want to say, even if one were to find some kind of intrusion into the powers of the Executive Branch—for instance, a limit on the Attorney General's power to fire someone—the limitation is extremely small and pales by comparison with the enormous public benefit to be derived by having assurances that we have an independent prosecutor who will take care that the laws shall be faithfully executed and that we will avoid conflicts of interest.

In our view, the analysis of the Supreme Court in *Nixon v. GSA* precisely supports this very approach of balancing of interests in separation of powers cases. There is simply no interference of the

kind that the court in *Nixon v. GSA* said was necessary when you do not have an ongoing intrusion, and thus any small diminution of power of one branch is not automatically a violation of separation of powers.

The opinion in my view directly rejects the Department of Justice's air-tight compartment view of separation of powers. Perhaps that is why in their 56-page statement today, there is not a single reference to the 1977 opinion on separation of powers in *Nixon v. GSA*. I think that is a shocking omission from the Department's paper, and it seems to me an indication of the one-sided nature of their presentation on the conflict of interest and on the constitutionality issue.

I also want to make clear that, although the Department says that the independent agencies would not be jeopardized, since the commissioners could retain their position, if you read their position carefully, I believe it would mean that the people who make the decision to begin law enforcement proceedings at the various independent agencies—and I am speaking of the General Counsel of the National Labor Relations Board, the General Counsel of the SEC, and the General Counsel of the Federal Trade Commission—that those individuals who, in the Justice Department's view, are law enforcement individuals, would have to become subject not to the commissioners for whom they now work, but to the President of the United States or to the Attorney General. Thus, I think we ought to be clear that while the Department purports to claim that the independent agencies would be untouched, in a very real sense there would be a major change in the way the independent agencies are operated.

There are a few other points in the Department's statement that I want to note. Perhaps the most pernicious part of its statement is the idea that the Department of Justice should retain absolute control over the budget of the independent counsel. It seems to me that if you want an independent counsel but do not want him to be independent, you simply control the purse strings. If you do not give him FBI agents, or you do not give him a budget for a reasonable number of assistants, there is no chance that the investigation is going to be carried out in a fair and impartial manner.

Similarly, on a related question, the Justice Department says that delay is a problem and that these investigations should be concluded promptly. I agree, but I would note the irony that in the Olson, Dinkins and Schmuts investigation, the Department while purporting to want these matters concluded quickly, in fact as the chairman pointed out earlier, exceeded by a factor of almost a third, the number of days allotted under the statute. I do not think that is fair to anyone—the people who are being investigated or the American people. Thus, I would urge strict compliance with the statutory deadlines.

Second, I would note that on page 28 of Mr. Bolton's statement, he says that the independent counsel should not be used to decide political disputes, that it ought to be limited to criminal investigations. Once again, I find a wonderful irony in this because the principal example that I have seen of the use of an independent counsel for political purposes was by the Attorney General himself. When he was before the Senate Judiciary Committee for confirma-

tion, he sought the refuge of an independent counsel to avoid a political problem, to avoid the committee voting up or down. He sought the umbrella of an independent counsel to clear the decks so that he could be confirmed by the Senate and, incidentally, get his attorneys' fees paid, which he would not have had happen had those attorneys' fees been paid in connection with his confirmation alone.

Third, the Justice Department talks about the problems of standards of conduct as they apply to the independent counsel. In their view, all of these individuals become special government employees, and the whole penumbra of requirements of Title 18 apply to them.

This is neither the time nor the place to debate in full the correctness of the Justice Department's interpretation. In my view that interpretation ought to be irrelevant because I think that the question of the limits placed upon what outside income, what other activities, and what post-independent counsel employment ought to be undertaken is a matter that Congress ought to take under its wing and deal with directly. I say that because there are a couple of problems that make it very different in appointing an independent counsel and overseeing his other activities than for other government employees.

First, these appointments are for short term.

Second, many of them operate less than 100 percent of the time, not because they are not vigorously pursuing the matter, but simply because in many cases you have to wait to send FBI agents out and get their responses before you can go to the next stage. There is no point in simply working to spin your wheels.

Third, independent counsels come with clients, who are already there, whom they simply cannot leave 100 percent in the lurch. While it may be possible to have their associates handle some matters, they simply cannot do it on a 100 percent basis. It would be unfair to the clients, and any such requirement that made them do that would mean that we would simply be less able to get the kind of individual for an independent counsel whom this committee desires to be in those positions.

Further, there remains the problem of what kind of continued association with other caseloads should be permitted. Should someone who is an independent counsel be entitled to represent others who are before other independent counsels? What about other criminal investigations in the Justice Department? What about matters before the SEC or the FTC or the Social Security Administration?

The Justice Department takes the view that the government is the government, and you cannot represent anyone before any agency of the government if you are employed as a special government employee. If that is right, that seems to me to be an overly strict view, particularly if one imputed that kind of disqualification to members of the firm.

Without giving any indication of precisely where the lines need to be drawn, I urge the committee to undertake that investigation lest we start to have motions to disqualify independent counsel because they are not complying with conflict of interest statutes, just

like we have seen a rash of motions to disqualify in federal courts over other matters.

The last point I want to make today relates to the congressional use immunity laws as they apply to the independent counsel. In general, those use immunity laws are working well, but there are special problems with the independent counsel.

In the first place, independent counsel generally get involved in those cases in which the political interest by the Congress is the highest, and with considerable justification. Thus, in these, the greatest pressure occurs for congressional hearings.

Indeed, there would have been insurmountable pressure for congressional public hearings and, hence, use immunity by now, if the Tower Commission Report had not come out. We were lucky to have that in this case, and that is the only thing that has kept down the immediate pressure.

Second, in the usual criminal investigation case, the Justice Department has a lead over the Congress in its investigation. Quite the opposite is true with the independent counsel. The matter has to go through a whole public process. Generally the allegations are known, and that is how the independent counsel gets appointed. By the time the independent counsel gets appointed, the Congress is already fully investigating the matter and everyone wants to know why the independent counsel cannot pick his staff and get done.

It seems to me that that is a very difficult position for the independent counsel to be in. Therefore, I urge the committee to give the most serious consideration to seeking an amendment to the congressional use immunity law to provide a greater period of time in which the independent counsel can conduct his investigation before congressional use immunity can be invoked. It is vital in my view for the independent counsel to know at the start of his investigation, not during the course of it, how much time he or she is going to have before having to worry about congressional use immunity.

I have nothing further that I would like to summarize, but I would be prepared to answer any questions that the chairman has.

Senator LEVIN. Thank you, Mr. Morrison, for being here and for your statement. If you would like to expand that statement in any way, we would be happy to have you do that for the record.

Mr. MORRISON. I do have copies of my brief that I have submitted for the record which lays out the constitutional argument in somewhat greater detail and I ask that they be included.¹

Senator LEVIN. They will be, and we appreciate that as well.

I am going to ask you just a few questions at this point. We may have some additional questions after the hearing is over that we would appreciate your answering, and this is true for the other witnesses as well. We will keep the record open for that purpose.

Let me just ask you a few questions now, given the hour.

Should we eliminate the pre-preliminary stage altogether? What we have seen too often is that that stage has been used by the Department of Justice to avoid what was pretty clearly the intent of the statute, which was that that simply be a way of screening out

¹ See p. 314.

the totally incredible charges from incredible sources. Instead it has been used as a substitute for the preliminary investigation phase, and the difference, of course is critical. There is no accountability when an "inquiry" is substituted for the preliminary investigation stage because the Justice Department does not have to file the report with the court.

Should we just eliminate that and go back to the pre-1982 standard of, where there are allegations you "must" go forward?

Mr. MORRISON. I would not favor eliminating it. I think perhaps what you need to do is to change the word "credible," not eliminate it entirely; to put it perhaps in a negative sense.

For instance, I remember a case when I was Assistant U.S. Attorney. We got a complaint that the CIA had satellites that were causing x-rays to be bombarded on a woman who lived, I believe at that time, in the State of Michigan.

If someone made that allegation about the head of the FBI, for instance, it seems to me that, even if it is very specific and the complaint names dates, times, and places when this occurred, the Attorney General has to have some discretion to be able to weed those out.

I think that the word "credible" ought to be changed. I do not have a precise word in mind, but I would like to think about that. At least the legislative history ought to be made clear. The one abuse which I see as occurring is that the Attorney General is making determinations on basic issues of credibility. He is not deciding whether it is wholly incredulous on the one hand, for that he certainly has to be able to do. But if he believes or does not believe a particular witness, that is surely not his function, and the statute should be amended to make that clear.

Senator LEVIN. Any specific suggestions that you have in that regard would be most welcome. It is clear also that the use of the element of intent has been misused, at least in my book, by the Justice Department as a way of avoiding getting to the preliminary investigation stage and probably even once they get past the preliminary investigation stage. But any specific suggestions you have on either the language of "credible," on the language of "specific," or on the use of the intent element in the pre-preliminary stage or in the preliminary stage itself would be appreciated.

Mr. MORRISON. Let me explain one problem of eliminating the intent question entirely. Let me give you a hypothetical in which a high official of the government is required to file an annual disclosure statement. It turns out that the disclosure statement was not filed. That is absolutely clear; the law says that it must be filed, but the criminal law applies only if the failure is intentional.

It turns out that somebody called and said to him, "You did not file your statement." And he said, "Yes, I did." And then he looks in his file, and it turns out that the signed statement is there, and somebody simply did not file it.

Now, in that situation it seems to me that the Attorney General ought to be able to have the discretion to say, I am not going to start a preliminary investigation and so forth and so on.

So I do think we have to leave some discretion in the Attorney General. I think the difficult problem for the committee is to try to

write a law that does not make it so silly that every time we turn around we have got an independent counsel being appointed.

Senator LEVIN. I think there is only an average of four cases a year where the Justice Department has even considered the application of Title VI. So it is not as though there is a whole lot—

Mr. MORRISON. That is only four cases a year in step one. Yes.

Senator LEVIN. It is not as though there are a whole lot of cases coming in which talk about spaceships and moon beams and so forth.

Mr. MORRISON. But there could be. And if people know about it and know that they could do it, it would create an incentive at least for political opponents or people who have personal disagreements and so forth and so on.

Senator LEVIN. The possibility of that abuse is there. It is there surely now, but it has not yet been manifested. The problem is that the other side has been abused.

I think Senator Heinz is right. We have to find a way here to correct whatever abuses we see in the way this has been implemented, if that is what the subcommittee finds, without doing damage to what we want to do, too. We do not want to be unfair to people. People who are in public office have as much right to equal protection, due process, and fair treatment as people who are not in public office.

That is what we tried to do in 1982—to make sure that we did not mistreat people in public office in an effort to make sure that they were being objectively treated. And we have to, if we address a balance, make sure at the end that we do not open up new, unintended pitfalls in the statute.

Let me again thank you. There will be additional questions that we have for you and other members have for you. At this time, though we will excuse you with our gratitude.

Mr. MORRISON. Thank you, Senator.

Senator LEVIN. Our next witness this morning is Irvin Nathan, who is Chairman of the Ad Hoc Committee on the Independent Counsel Statute of the American Bar Association.

Mr. Nathan is the former Deputy Assistant Attorney General of the Criminal Division of the Justice Department and he worked with the independent counsel statute in that capacity.

You are most welcome, Mr. Nathan. Again, if you could summarize your statement, we would most appreciate it. We will put your entire statement in the record.

TESTIMONY OF IRVIN B. NATHAN,¹ CHAIRMAN, AD HOC COMMITTEE ON THE INDEPENDENT COUNSEL STATUTE, AMERICAN BAR ASSOCIATION

Mr. NATHAN. Thank you, Mr. Chairman. It is a pleasure to be here to present the American Bar Association's position with respect to the reauthorization of and perhaps making permanent the independent counsel law.

As you know, since 1973, the ABA has been active in promoting legislation which tends to ensure that the public retains its confi-

¹ See p. 213 for Mr. Nathan's prepared statement with an attachment.

dence in the administration of justice when allegations of criminal misconduct are lodged against high-ranking officials of the Executive Branch of an incumbent administration.

Based on our analysis of the statute, the proposals for such a statute before it was enacted and the experience with the statute over the last ten years since its implementation, we remain convinced that it is imperative for the administration of justice and the continued public confidence in the fairness of our system that the Congress reauthorize the independent counsel provisions of the Ethics in Government Act.

We are convinced that the independent counsel provisions as they presently exist are fully consistent with the letter and spirit of the United States Constitution. That is the principal message which we bring to the committee today: that the basic mechanism has worked reasonably well; that it should continue to operate; and that it should be reenacted and reenacted permanently.

We have two suggestions for modifications which are premised in large part upon the matters that you have discussed at length today with the Department of Justice and other witnesses.

First, the American Bar Association has, since 1976, advocated that there be at least limited judicial review of an Attorney General's decision not to seek the appointment of an independent counsel or a special prosecutor. We believe that such judicial review is sound public policy and is constitutional. It ties into the basic premise of the statute which is to give confidence to the American people that these decisions are being made by an independent neutral party, uninfluenced by partisan politics.

Second, as you have discussed, we believe that it is appropriate that the Division of the Court retain the power to modify and expand the jurisdiction of the independent counsel after the independent counsel has been appointed, even without the consent of the Attorney General.

We believe it is appropriate that the Attorney General be consulted with respect to such expansion and that the court consider the view, of the Attorney General, but in the final analysis, it should be the court which establishes the prosecutorial jurisdiction of the independent counsel.

Our proposals stem from the basic purposes of the statute—to ensure public confidence. Let me go back to the beginning. I would like to trace, just very briefly, the history of the ABA and the implementation of this legislation.

When we first proposed in 1976 that there be a special prosecutor, it was the view of the ABA that the court should be the appointing power. We believe that such authority was provided for by Article 2, section 2 of the Constitution which that Congress can empower the court to appoint a special prosecutor.

The device that was chosen by the Congress is very similar to the proposal originally made by the ABA, with the exception of what the court would do upon receipt of a memorandum by the Attorney General. As we saw it, the memorandum from the Attorney General could have three conclusions. First, having made the preliminary investigation, the Attorney General could conclude that no special prosecutor was needed. Second, he could decide that a special prosecutor was needed, and appoint a special prosecutor. And,

third, he could say that the court should appoint a special prosecutor because that the Attorney General should be recused from making that appointment.

But, most importantly, the ABA proposal was that following receipt of the Attorney General's memorandum, the court could make an independent analysis and decide either that a special prosecutor was required, even though the Attorney General had said one was not, or that the special prosecutor that the Attorney General proposed to appoint was for some reason not suitable, and substitute a different special prosecutor for the one chosen by the Attorney General. Finally, of course, the court could agree with the Attorney General and appoint a special prosecutor.

The original legislation was enacted in 1978. I was at the Department of Justice at that time and am aware of the severe constraints on the Department in terms of a lack of discretion and of having to go forward with matters that in normal course might not have resulted in any serious investigation or prosecution, nonetheless, special prosecutors were sought in those cases because that is what the statute required.

In 1981 and 1982, during the first reauthorization process, this committee and the Congress reexamined the situation and made what the ABA believes were appropriate changes to provide more discretion to the Attorney General in order to allow him to avoid needless and expensive investigations which would cause unnecessary harm to public officials and ensure that they not be treated unfairly simply because they were public officials.

We believe that those revisions were appropriate then and we continue to believe that those revisions are appropriate.

On the other hand, there was no offsetting judicial review of the increased discretion given to the Attorney General. When the Attorney General, under the present statute, files a memorandum with the Division of the Court and says "I do not believe that there is any reasonable ground for further investigation," even when from the face of the memorandum it appears that additional investigation may well be warranted, there is no power for the court to review that determination. As presently written, the statute does not permit the court either to send the matter back to the Attorney General for further consideration or to decide that, notwithstanding the conclusion of the Attorney General, the memorandum filed by the Attorney General itself suggests that there should be an independent counsel to investigate the matter.

Similarly, as matters are presently written, the statute is a little ambiguous with respect to the power of the court following the appointment of an independent counsel. The statute in one place states that upon the request of the Attorney General the court can expand the independent counsel's jurisdiction. In another place it says that the independent counsel can ask either the Attorney General or the court to expand his or her jurisdiction. But the statute it does not explain what a court can do when the independent counsel requests that expansion but the Attorney General does not concur in that request.

We think it was the original intent of that provision that the court have the power to expand the independent counsel's jurisdiction over the Attorney General's objection. If the court does not

have this power, then it does not make much sense for the independent counsel to make a request to the court. In addition to believing that this was Congress intent, we believe that it is appropriate that the court have such authority.

We are aware that there are some arguments dealing with the constitutionality of judicial review and also of the question of the court's expanding the independent counsel's jurisdiction. Having analyzed that issue, the American Bar Association believes that it would be constitutional for the court to review the decision of the Attorney General not to seek the appointment of a special counsel and it would be constitutional for the court to have authority to expand jurisdiction.

The arguments in favor of the constitutionality of these proposals are precisely the same arguments that Professor Cox and Mr. Morrison have explained here today; namely, that it is up to the court to make the appointment; that the Congress has the authority under the Constitution to empower the court to make that appointment and to expand the jurisdiction; and that the appointment power and the power to expand jurisdiction are not dependent upon the consent of the Attorney General.

Let me say finally that the power to review decisions not to seek appointment of an independent counsel is consistent with the kind of power the court generally exercises to review administrative decisions including decisions whether or not to initiate enforcement action.

There have been at least two Supreme Court cases in the civil context¹ which would apply equally in the criminal context in which the Supreme Court has held it is within the power of the Congress to provide for judicial review of whether or not to initiate enforcement action. The courts can look to the actions of the Executive Branch and decide if they were reasonable and meet the standards which the Congress has established.

Thus, we believe our proposals are within the power of the Congress, are sensible and appropriate and would further the public confidence in the administration of justice.

Thank you, Mr. Chairman.

Senator LEVIN. Mr. Nathan, first let me thank you and thank the American Bar Association for your testimony. It is extremely critical testimony in our deliberations. The position of the ABA supporting the constitutionality of the present statute, as written, is indeed very powerful support for efforts which we will be making both to maintain the statute and to improve it.

We appreciate the willingness of the ABA to take the time which it takes to reach this kind of a decision and to authorize you to speak in their behalf.

Mr. NATHAN. You are very kind, Mr. Chairman.

Senator LEVIN. You were at the Department of Justice in 1978, I believe you said?

Mr. NATHAN. Yes.

Senator LEVIN. Did the Department of Justice support the independent counsel statute as enacted?

¹ *Heckler v. Chaney*, 105 S.Ct. 1649 (1985) and *Dunlop v. Bechowski*, 421 U.S. 560 (1975).

Mr. NATHAN. I believe that in the Carter Administration, the Department of Justice supported the special prosecutor legislation. While I am not here as a partisan, and certainly the ABA is not, I think that the statements made by the Department of Justice today that this has been a uniform position throughout time are not quite correct.

It is true that this may have been the Department of Justice's position in 1976 and it was clearly the position in 1981 when the Associate Attorney General, Mr. Giuliani, called for abolition of the statute. However, prior to 1978, I believe the Carter Administration supported the special prosecutor statute.

Senator LEVIN. Thank you.

The suggestion that there be limited judicial review of a decision not to request the independent counsel is a very interesting and important one. I understand that this would be only by the special court on a *sua sponte* basis.

We have thrown some Latin around here this morning. As I remember *sua sponte* from my law school days 120 years ago, it means on their own—indeed, *ex parte*, I presume, but I am not sure of that.

Let me ask you this, though. Would the court be able to use only the report of the Attorney General in that limited function, or could it use other sources of information, under your proposal?

Mr. NATHAN. The ABA believes that the court could use other sources of information. I want to make one thing clear. The ABA does not sponsor and I do not personally support, authorization of private individual actions to compel actions by the Attorney General. Such a concept would create the potential for actions all across the country of the with baseless, frivolous allegations.

Rather, it is our position that the court's review would be triggered by the report from the Attorney General. However, the court need not necessarily be limited to that report in reaching its conclusions.

For example, I would support the position that Professor Cox suggested, that as to certain important legal issues that have to be raised, it would be appropriate for the court to advise the public of what the issues were and permit *amicus curiae* briefs to be filed dealing with legal issues that are involved.

In addition, in light of the congressional powers that exist under the independent counsel statute, if the Congress requested an explanation from the Attorney General, either as to why he did not conduct a preliminary investigation or as to why he reached a conclusion after his preliminary investigation not to request appointment of an independent counsel, I believe it would be appropriate for the Congress or a committee to make its views known to the court and that could be a factor in its decision.

Senator LEVIN. Mr. Nathan, let me again thank you. We would most appreciate your working with us as we address a lot of specific questions. There will be a comprehensive bill introduced after all these hearings prior to markup. Senator Cohen has already introduced a bill which I have cosponsored. Senator Cohen, of course was the leader of an effort to improve this bill in 1982, and his continuing support is critical for us to move in the strengthening direction rather than in the undermining direction.

We will be addressing lots of specific issues: the pre-preliminary issue; the question of whether intent should be looked at and, if so, to what degree by an Attorney General and at what stage; the questions that you have raised in terms of limited review of a decision not to proceed even to an investigation stage; the question again of the use of intent; the mandate of the special prosecutor or the independent counsel, as we now call him or her.

There are lots of specific questions that we will be addressing and we would most appreciate the ABA, through you or other of its members, working with us as we address those issues.

Mr. NATHAN. Both the ABA and I personally would be delighted to assist in this very important work. This committee has done excellent work in the past and we would like to help it in the future.

Senator LEVIN. Mr. Nathan, we thank you and the other witnesses and we stand adjourned until tomorrow at 9:30.

[Whereupon, at 12:45 p.m. the committee adjourned, to reconvene at 9:30 the following day, Friday, March 20, 1987.]

OVERSIGHT OF THE INDEPENDENT COUNSEL STATUTE

FRIDAY, MARCH 20, 1987

U.S. SENATE,
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met at 9:30 a.m. in room 342, Dirksen Senate Office Building, Hon. Carl Levin, chairman of the subcommittee, presiding.

Senators present: Senators Levin and Cohen.

Staff present: Linda J. Gustitus, Staff Director and Chief Counsel; Elise J. Bean, Counsel; Jack Mitchell, Investigator; Mary Berry Gerwin, Minority Staff Director and Chief Counsel; Frankie de Vergie, Chief Clerk; and Richard Allen, Professional Staff Member.

OPENING STATEMENT OF SENATOR LEVIN

Senator LEVIN. The subcommittee will come to order.

This is the second day of our subcommittee's hearings on oversight of the independent counsel statute. Yesterday we heard testimony from the Department of Justice that, according to the Department, the statute as presently drafted has constitutionally suspect provisions. The suspect provisions, it turns out, are the ones that go to the very heart of the independent counsel process: appointment by the special court, removal for cause, and the ability of the special court to define the jurisdiction of the independent counsel.

We heard opposing testimony, concluding that the present statute is on a constitutionally sound footing, from three witnesses: Archibald Cox, former special prosecutor in the Watergate matter and current professor of constitutional law at Harvard Law School; Alan Morrison, principal litigator in the most recent and major separation of powers cases; as well as Irvin Nathan representing the American Bar Association.

The resolution of the constitutionality issue rests, as it should, in the courts. Our job here is to reauthorize the independent counsel statute in the best possible form, both for purposes of constitutional scrutiny and to ensure the law's effective and meaningful implementation.

Through the course of the subcommittee's investigation it has become clear to me that the Justice Department has in a number of ways over the past few years undermined the statute. We heard

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evidence, much of which came from the Justice Department's own statements, that it has substituted its own standards, quite different from those of the statute, in at least three critical junctures in the independent counsel process: the decision to initiate a preliminary investigation, the point at which the clock starts ticking on the 90-day period, and the decision to seek an independent counsel.

We also referred to three separate federal district court cases in which the Justice Department was found to have improperly refused, under the standards in the independent counsel statute, to initiate a preliminary investigation. Justice's response was to say that the complainants had no legal right to force the Department's compliance with the law. The Department won on that procedural point in its appeals of the three cases, but that does not negate the findings of the lower courts and it does not negate the Department's responsibility to conduct the preliminary investigations required by the independent counsel statute.

One issue that raised itself for the first time yesterday is the Justice Department's interpretation of the statute's provision for good cause removal of a sitting independent counsel. Mr. Bolton, the Department's representative, in response to Senator Cohen's questioning indicated that he believed the President could fire any independent counsel who refused to comply with a presidential order. Mr. Bolton made no distinction for presidential orders which may affect the very independence of the independent counsel. This was a disturbing new example of the Justice Department's undermining of the statute. We will be discussing their interpretation of the removal standard with today's witnesses.

Another issue which we touched upon yesterday, the issue of Attorney General Meese's decisions not to recuse himself in the case of Ambassador Whittlesey and former Deputy Attorney General Schmults, will also be pursued in greater detail today.

We will also discuss the actions and the conduct of the independent counsels themselves. Alexia Morrison, the sitting independent counsel in the EPA case, has served in that position for over a year. It has come to light recently that she has also, months after her appointment as an independent counsel, chosen to represent Carl Channell, one of the subjects in the Iran-contra independent counsel investigation by Lawrence Walsh. This decision by Ms. Morrison raises two questions which we will pursue today: (1) whether an independent counsel may be violating applicable standards of ethical conduct in serving in such positions at the same time, and (2) whether an independent counsel should be required to pursue the independent counsel activities on a full-time basis.

We will also explore additional legal questions the answers to which will assist the subcommittee in the reauthorization process.

Senator Cohen.

Senator COHEN. Thank you very much, Mr. Chairman.

OPENING STATEMENT OF SENATOR COHEN

Senator COHEN. Let me initially welcome Mr. Cutler. We have been advised that he has just returned from The Hague and is on a different time zone. I must say, Mr. Cutler, that a lot of us have felt you have always been on a different time zone, and I say that

in the most positive sense, being well ahead of most of us on many issues.

Yesterday's hearing did, as Senator Levin indicated, raise some serious questions about the appropriate enforcement of a law that both of us have been very involved with, as has Mr. Cutler, from its inception.

You will recall that back in 1981 and 1982 when we held hearings, in which you played a very instrumental role, we were trying to refine the law to give the Attorney General a little more flexibility so that the law would not be applied so rigidly that we actually ended up doing just the reverse of what we set out to do, and that is to punish public officials by virtue of their position without regard to the nature of the allegation or, indeed, whether the Justice Department ordinarily would punish an individual citizen.

In order to avoid setting a double standard of giving preferential treatment to high level officials, we found that in the application of the law being too rigid, we might very well achieve the opposite result, and that is to impose a much more severe standard upon public officials. So we offered some changes that would allow the Attorney General to take into account the credibility of the witness or the person making the allegation about official wrongdoing.

In addition to that, we asked that the Justice Department apply a standard, and that the independent counsel apply a standard that they would not prosecute cases if that were the policy of the Department of Justice.

What we have found as a result of yesterday's hearing and prior inquiries on the part of the committee staff, is that the Justice Department appears to have engaged in extensive inquiries prior to the preliminary investigation as envisioned by the law itself. They have also tried to determine the existence of criminal intent before even proceeding to the preliminary investigation. Of course, in those circumstances there would be no filing with a court. In the event that the trigger is never applied, when there is no preliminary investigation, no filing ever occurs with the court, so the public and the Congress is never in a position, indeed, the courts are not in a position, to determine whether the law is being abided by.

I think these are serious deficiencies in the application of the law.

They have also applied a new standard in determining whether the Justice Department should go forward, whether the independent counsel would be recommended, a standard as to whether a jury would convict that individual based upon all the evidence available at that time. That, to me, is far too high a standard to be applied at the pre-preliminary level, and it seems to me we should not tolerate that sort of a standard being applied.

I would hope that we would take into account whatever changes have to be made. I suggested, at least hypothetically, yesterday that we might return to the pre-1982 changes and simply take out the flexibility that was granted at that time to the Attorney General. I think it would be a mistake. I think the law can be refined. That is one reason why we are constantly reviewing it, as you have suggested, every five years. I want to see the law made permanent so that we don't face the sunset provision every five years. But

nonetheless, I think it is important that we continue to exercise the kind of oversight that has been conducted during the past several days.

Thank you, Mr. Chairman. I commend you for continuing these hearings.

Senator LEVIN. Thank you, Senator Cohen.

We want to now welcome Lloyd Cutler, who is an old friend of both of ours, an extremely distinguished lawyer—a very tired lawyer at the moment because of that flight back from Europe—former Counselor to President Carter, co-chair of the Ethics in Government Task Force at Harvard University and the John Kennedy School of Government, and a major contributor to the formulation of the very statute whose reauthorization we are considering yesterday and today.

Mr. Cutler, a very warm and special welcome to you.

TESTIMONY OF LLOYD N. CUTLER, WILMER, CUTLER, AND PICKERING

Mr. CUTLER. Thank you very much, Mr. Chairman. I would like to compliment both of you for your leadership over the last 10 years in seeing to it that we did have a law to deal with potential conflicts of interest on the part of normal prosecuting authorities and a means of giving the public confidence that a political conflict of interest in particular would not interfere with a proper investigation of whether substantial charges of violating the law were indeed justifiable and should be prosecuted.

Senator LEVIN. Mr. Cutler, your compliments to the members of this committee will, of course, be highlighted in the record, and your entire statement¹ will be made part of the record. If you feel comfortable summarizing that statement, we would love for you to do that.

Mr. CUTLER. I won't summarize the statement. It is there for you, and I will be glad to answer questions about it.

Let me say just briefly that the independent counsel statute, the change in term which both of you brought about back in 1982, certainly has proved its worth over the last 5 years. If there was any doubt about it before, I think the record of the last 5 years clearly justifies having a procedure such as this one.

So far, although we have had a number of cases over the last 5 years and a number of independent counsel appointed, there has been only one indictment, and that indictment is, as so often happens, not for the substantive crime which at least primarily led to the initial call for the independent counsel but for perjury in the course of the investigation and the events leading up to the investigation.

It is well worth noting, I think, that the largest single individual beneficiary of this statute has been the Attorney General himself. One might almost say that but for the existence of this statute the present Attorney General would not hold the position he now holds. It was because this statute existed that when charges were raised relating to the Attorney General's prior conduct at an earli-

¹ See p. 254 for Mr. Cutler's prepared statement.

er stage that an independent counsel could be invoked and could investigate those charges and conclude, as he did in that case, that they had no substantial basis, and make it possible for the Senate to go forward and confirm his nomination. If we had had no independent counsel and those charges had been there for the Senate alone to investigate, or if an investigation had been conducted by the then Attorney General, Attorney General Smith, public suspicion that in one way or another the charges had not been fully investigated would almost certainly have cost the Attorney General the chances of his confirmation and appointment.

I think he is well aware of that, and I myself would give him the benefit of sincerely wanting to have a mechanism like this available for dealing with charges such as those that were made against him and that are made from time to time against other high officials of the government.

There may well be some improvements that are needed. Five years of experience always leads to a point you didn't think about that may need some correction. But on the whole, I would be inclined to stay with what you have. I think it has worked very, very well. In particular, I would stay with the present method of appointment of the independent counsel, and I would retain the provision saying he can be removed for cause. To me cause means something more than not complying with an order from the President, particularly an order relating to the conduct of a particular investigation or prosecution.

I think that the present method is constitutional. We will find out about that in due course now that Mr. Deaver's counsel have raised it. Should I be wrong about that, should the Supreme Court ultimately hold that it is not constitutional, I do think there is another way, a way I proposed 5 years ago, that you might consider. I would not recommend changing to it now because I think your chances of sustaining the law as it is are very considerable.

That way would be to authorize the President well in advance of the event to nominate a panel of independent counsel, perhaps six, not more than three from one party, who would be nominated and appointed subject to the advice and consent of the Senate. They would be a standing panel of distinguished lawyers who could be called on from time to time, and should a situation arise in which the need for an independent counsel is triggered, then the Attorney General could apply to the court to make a selection from that panel. Should the Supreme Court decision that we will ultimately get, I think, in Mr. Deaver's case say that the court cannot even do that, I don't think much would be lost in allowing the President or the Attorney General to make a selection from a panel which had been previously confirmed by the Senate before any of the events arose.

With respect to the issue of the threshold for seeking the appointment of an independent counsel, as you will recall, the threshold in the original statute was so low—I think I called it then something like a tenth of a millimeter high, or some such thing—that even after the public, the press and the Department of Justice were fully satisfied that the cocaine allegation made against Hamilton Jordan was not worth further investigation the Attorney General, Mr. Civiletti, felt, and I think under the statute of the day

quite rightly, that he still had to go ahead and seek what was then a special prosecutor. That is why you raised the threshold, and I think it was proper to do that. The analogy you used at the time, I think, was it would be akin to probable cause for a search warrant: was there enough to justify going further?

I am not familiar, of course, with what the Attorney General has done in each of the particular cases that have come up over the last five years, but if he has decided not to go forward in a particular case by a judgment that criminal intent was lacking, or that a jury would not convict, I think that goes too far. I don't think those are true probable cause issues. Intent in particular, if the circumstances existed, that is, if they go beyond a true alibi defense that the telephone call was never made, that the visit never happened, or the day it is alleged to have happened there is conclusive proof the government official was in Seattle or some other thing, then I think it is appropriate not to go forward. But if it did happen and the only question is intent, criminal intent, and whether a jury in the end is going to convict, then, it seems to me, those are decisions that ought to be made after the independent counsel is appointed.

I think I have said enough to stop right there.

Senator LEVIN. Thank you very much, Mr. Cutler.

We have discovered and yesterday's testimony confirmed that the Attorney General performs extensive investigations at the pre-preliminary investigation stage—in the Whittlesey case, flying investigators to Europe, among other things, and spending many weeks and a great amount of talent and time to do the investigation.

Are you familiar with the facts in some of the cases where the Attorney General has decided not to proceed to a preliminary investigation but has simply decided at the pre-preliminary stage to drop the matter? Are those facts familiar to you in any of these matters?

Mr. CUTLER. Only from the newspapers, I'm afraid. I am not generally familiar with the allegations in the Whittlesey case. I must say I am not very familiar with the allegations in the Schmuts case.

Senator LEVIN. Your written testimony says that in virtually every case in which an allegation is made against a covered official the Attorney General will need to initiate a preliminary investigation. We have found, I am afraid, that there is this long period of delay and that in effect the Attorney General has turned the preliminary investigation into a pre-preliminary investigation with the result that he is not accountable to anybody and he never has to file a report with the court.

My question is this. How do we specifically address that issue?

Should we put a time limit on phase 2 of the independent counsel process, when the "AG determines whether information is specific and from a credible source"?

Should we say in the statute that it is not intended that the Attorney General use that determination in phase 2 as a way of determining whether every element of the crime has to be present in order to go to the preliminary investigation stage, phase 3?

Should we say in the statute that lack of specific direct evidence on criminal intent is not enough to block a preliminary investigation?

If we are going to close this loophole which the Attorney General has opened, we have to do something, it seems to me, other than put in our report that we disagree with the Attorney General's interpretation.

Do you have any specific suggestions?

Mr. CUTLER. Yes. I do think that while investigation is a sort of rolling affair, that is, information comes in on day one which might not be credible; more information comes in on day five, which might be credible, et cetera; that to distinguish between the preliminary investigation and some pre-preliminary investigation at the moment some information comes in doesn't make too much sense. It is a hard thing to police, but I would think the requirement ought to be that the beginning date ought to be the date when the Attorney General receives some information that he begins looking into. It seems to me if he says he is making a pre-preliminary investigation, then the 90-day period ought to be begin at that moment.

Senator LEVIN. The way he has phrased it is that he is making an inquiry preliminary to the preliminary.

Mr. CUTLER. I would begin it right then and there.

Senator LEVIN. Starting the 90-day period doesn't solve the problem either, because if you don't have to file a report unless you proceed to a preliminary investigation we never know whether or not the 90-day clock has run, and we don't know the reasons for not proceeding to a preliminary investigation.

How do you overcome that problem, that there is no accountability if we allow an inquiry to be more extensive than just a very, very quick determination as to whether the source is credible? Any other suggestions besides the 90-day period?

Mr. CUTLER. You could date it from the first receipt of information.

Senator LEVIN. Would you require a report then?

Mr. CUTLER. I would require a report 90 days after that.

Senator LEVIN. We now do date the 90 days from the receipt of information.

Mr. CUTLER. Except he can quibble about whether it is specific and from a credible source.

Senator LEVIN. Yes, but the 90-day does run from point 2 if in fact you move to point 3. So we already have that 90-day period running from point 2.

Mr. CUTLER. You could date it from 1.

Senator LEVIN. Excuse me. It does date from point 1. Points 1 and 2 kind of lap together. So we already have the 90-day period running from the receipt of the information, not from the beginning of the preliminary investigation. So we have got to do something else.

The Attorney General, by the way, has also undermined that provision by saying the 90-day provision starts from the time that the Attorney General makes a determination in phase 2, but that is not what the statute says. Putting that aside for a minute, we have got to find a way of closing that loophole, and I don't think

moving back the 90-day clock does it, because it is already moved back, and that loophole is very prevalent.

Mr. CUTLER. The receipt of information is a concrete fact. A letter comes in over the transom, or a telephone call, an informer's report, or an article in the New York Times. You could date from that date. If you want to give him a little more time, if you are going back that far, you would start from there. But then he would be under an obligation X days after that time to make his report to the court one way or the other.

There are many statutes which start a period of time by the filing of an application. For example, the agency must pass on it within X days or it is deemed approved. You could go to something like that. If the information is confidential, and you would want to keep it that way, I should think, you would have to rely in the end on his word as to when it was received.

Senator LEVIN. Let me change the question somewhat. The Attorney General has reached a conclusion that the word "specific" in phase 2 allows him to, in a pre-preliminary investigation mode, determine whether every element of the crime is there. That is what he is using that word "specific" for.

Mr. CUTLER. Take it out.

Senator LEVIN. That is what I want to know. Is that your suggestion?

Mr. CUTLER. For purposes of calculating the time, I would take it out. Yes. That lets him extend the time. Many agencies under these statutes that say you have 180 days on which to pass on an application will write a letter on the 179th day and say "your application is not complete; I need another piece of information"; and they start it running all over again. But you can deal with that.

Senator LEVIN. We take out the word "specific" for the purpose of starting the clock. Now what about for the purpose of reaching stage 3?

The Attorney General has said he never gets to the preliminary investigation stage if he finds the information is not specific, and he defines specific as including finding that all the elements of criminal intent are there. So we can take it out for the purpose of the clock starting, which is, frankly, what the statute already has done. But putting that aside, how do you stop an Attorney General from looking for all the elements of the crime and saying "I've got to be satisfied that they are there, that a reasonable prosecutor could convict before I get to the preliminary investigation, because you people have said I've got to determine whether the information is specific enough, and that is the way I define the word 'specific'?" Would you drop the word "specific" for that purpose?

Mr. CUTLER. No, I would not.

Senator LEVIN. How do we prevent this loophole from continuing?

Mr. CUTLER. If you require the Attorney General 90 days after the factual receipt of information, which you can establish, to make a report to the court, then at least he must account to the court on the 90th day as to what he has done even if that account is "it wasn't specific enough for me even to start a preliminary investigation."

Senator LEVIN. As I understand your answer, we would amend the statute by requiring a report even if there is no preliminary investigation.

Mr. CUTLER. Right. And the court, of course, has discretion whether or not to publish reports that are filed with it.

Senator COHEN. Would you yield?

Senator LEVIN. I will be happy to yield.

Senator COHEN. If we do what you suggested and simply have a filing with the court, in theory then, I suppose, you would find a situation in which the Attorney General by relying upon the words "specific" and "credible" would never have to reach the preliminary investigation and simply say "I've received information; after a 6-month pre-preliminary investigation I've determined there is no intent, the elements of the crime were not there, and therefore, I saw no need to trigger the statute."

Mr. CUTLER. We go back to the day he first receives the information, and the standard on the 90th day is whether further investigation is required by probable cause standards.

Senator COHEN. Let's say that we adopt that and he takes 90 days to pursue the question of whether or not intent and credible source and specific allegations are there, and he takes that 90 days and he files it with the court saying "I did not find these elements; therefore, I did not trigger the preliminary investigation."

Mr. CUTLER. I guess in essence what I am suggesting is that a preliminary investigation begins the day he receives information. At 90 days thereafter either he has concluded there is no basis for further investigation, and he so reports to the court—he would have had to have done a certain amount of work to do that—or he concludes there is a basis for further investigation, having established this, that or the other, and that must go to an independent counsel.

Senator LEVIN. You are combining 2 and 3.

Mr. CUTLER. That's right. I think that was the basic intent, that he has got 90 days from the time he gets some information to decide what to do about it, and he could conclude there is no further reason to investigate. It's that clear.

Senator COHEN. Then he is not allowed, really, to have any grace period to examine the credibility of the allegation.

Mr. CUTLER. Give him 120 days. But then you could be definite.

Senator LEVIN. I think we understand what you are saying. You said he has got 90 days after he gets "some information." That is the way you phrased it. Does that information in your revision have to be from a credible source?

Mr. CUTLER. I don't mean to reflect on anyone, but if the Attorney General were Edward Levi, you could say from a credible source. Your difficulty is in the nature of things you do not have a nonpolitical Attorney General and Department of Justice.

Senator LEVIN. My question is slightly different. If the Attorney General gets information from someone who claims to have just returned from the moon and somebody on the moon told him, and so forth, and he knows it is totally incredulous, knows that this person is absolutely loony, would you then require him to file a report with the court?

Mr. CUTLER. Yes.

Senator LEVIN. So that every bit of information that the Attorney General gets, even from an incredible source, must lead to an investigation and a report?

Mr. CUTLER. If you are concerned that your time limit is being avoided, I don't see any other way out of it. If you want to tie him down, that is the way to tie him down.

Senator LEVIN. Is that what you would recommend?

Mr. CUTLER. Again, I don't know the facts as to whether the Attorney General and his people have dragged their feet in these particular cases.

Senator LEVIN. My time is up.

Senator Cohen.

Senator COHEN. If I could just pursue that, Mr. Cutler. Taking into account the fact that you have not really adjusted to this particular time zone—

Mr. CUTLER. I am fresher in the morning than I will be in the evening.

Senator COHEN. The record of our hearings back in 1981 indicates that you testified that "Congress ought to recognize that, except in extraordinary cases, Attorneys General are capable of integrity that can be entrusted to exercise a limited amount of discretion in cases such as these. I therefore suggest that the language originally proposed in a speech by Attorney General Civiletti be adopted. It would require the Attorney General to conduct an investigation whenever he receives specific information sufficient to constitute a reasonable ground to investigate."

At that point you were advocating that we have "specific" as part of the trigger mechanism, and the words "reasonable grounds to investigate." Now we have a situation, 5 years later, where because of the alleged abuses of that discretion you seem to be advocating taking out the word "specific" and, indeed, even "credible," and simply say that 90-day time frame starts to run the moment the AG receives any information from whatever source.

Mr. CUTLER. What I have said is, if we did not have the problem of a Department of Justice which appears, at least to the Congress, to have from time to time political conflicts of interest.

Senator COHEN. But that is always going to be the case. Ed Levi was an exception to the rule.

Mr. CUTLER. Most of the time it is going to be the case. If you are satisfied that the further discretion you have granted has been abused, which I take it is the point of your question, then there is a way to correct for that abuse. All such ways have a cost. It may be you don't want to start wild investigations about incredible information or from unreliable sources of information, but I would have assumed that any charge of misconduct by a government official, no matter how loony the source may be, certainly a government official who fits within the categories of the independent counsel statute, gets looked into to some extent. I doubt that they are just thrown out of the window the first day. And if they do get looked into, then you could require a report of those results. If you want to give a little more time to determine whether it is credible, throw in another 30 days, throw in another 60 days, because it isn't going to make that much difference.

Senator COHEN. We received a letter from the former Attorney General William French Smith. I don't recall him testifying on the special prosecutor/independent counsel legislation during his tenure. I will read just a portion of it:

In my opinion, this legislation has not served the ends of justice, is cruel and devastating in its application to individuals, falsely destroying reputations and requiring the incurring of great personal cost, has applied artificial standards unrelated to culpability, and to that extent has prevented the use of normal standards of prosecutorial discretion. It has been used more for political purposes and media appetite than to achieve justice and has been a nightmare to administer, has caused a needless and substantial waste of taxpayers' money.

That's the good news. [Laughter.]

Mr. CUTLER. You get the impression he is leaning against it.

Senator COHEN. I think that sort of confirms his opposition to it. As I recall, during the prior hearings that we held he did express his view that the statute was unconstitutional.

Has that been your experience as someone who has dealt with defendants in these cases?

Mr. CUTLER. I think it is quite the contrary. I have cited you the instance of the Attorney General. He through his counsel requested the appointment of the independent counsel. So did Mr. Deaver in the first instance.

Senator COHEN. So did Mr. Donovan, as I recall.

Mr. CUTLER. You are quite right.

What we are dealing with is a problem of political conflict of interest. There is such a thing. There is no doubt there is such a thing. The Constitution certainly didn't build in requiring public officials to proceed despite their own personal or political or financial conflict of interest in a way that would lose the confidence of the public that they were acting impartially as public officials. It is a rare situation when charges are made worth investigating against a very high government official. But the President has conflicts of interest, and we need a system in which in these rare occasions where he is unable to take care that the law shall be faithfully executed in a way that will satisfy the public that he is doing so that someone else can take it on. In effect, you have a de facto vacancy for a particular case in the Attorney General's office or in the President's office, because in theory the Attorney General is the mere arm of the President, and it is perfectly appropriate in those circumstances to fill that vacancy.

One could argue the Constitution almost explicitly allows for it in this alternate method of appointment that Article II contains, appointment by the courts. It is perfectly appropriate in those rare situations to have another method of appointing someone by an impartial appointing power who can fill that temporary vacancy and discharge the responsibility.

Among other things, we must not forget that prosecutors are officers of the court. They are responsible to the court. They can be punished for contempt by the court. A prosecutor cannot bring a felony case without the approval of the court. He must go to a grand jury, which functions under a judge. This so-called prosecutorial power, like so many other powers in the Constitution, is not separate; it is shared. In the case of prosecution, it is essentially shared with the judicial branch in very many ways.

Even the defense counsel are officers of the court. The first Chief Justice of the United States, just to give you some idea of what the framers thought about the so-called separation of powers, was commissioned to negotiate a treaty. And so was Justice Ellsworth, who was also nominated to be Chief Justice of the United States. They weren't as rigid as many people say the so-called separation ought to be today. There is no other way of carrying on the affairs of the government when the Executive has a political or personal conflict of interest than finding another appointing power.

Senator COHEN. As you pointed out, this Attorney General has been the principal beneficiary of the Act, but he also has been the only beneficiary, to my knowledge, of reimbursement of reasonable attorney fees, a matter that you have been intimately involved with.

Mr. CUTLER. He will not be the last.

Senator COHEN. Well, we don't know. If the Act is struck down, then there will be no reimbursement.

Mr. CUTLER. He might have to make a refund.

Senator COHEN. Yesterday I had a momentary flashback, a sort of congressional version of the movie "Peggy Sue Got Married." I slipped back to my first year of law school and used the words "malum prohibitum" and "malum in se." Apparently Archibald Cox understood what I said, but no one else did. I haven't had occasion to use those phrases since about 25 years ago. I used it in conjunction with the notion raised by the Department of Justice that intent has to be reviewed by the Attorney General to determine whether or not there was any criminal act. They cited in their testimony the case of perjury; that obviously there was a situation in which someone was alleged to have committed perjury and they make a pre-preliminary investigation and they find that Senator Levin forgot to administer an oath or that I forgot to administer an oath and therefore no perjury occurred, they could therefore throw the case out, and never have to get to the preliminary investigation stage. That may be true in that case, but I think you would be hard pressed to find other cases in which the intent which is so integral a part would warrant a separate pre-preliminary investigation. I think that is something we really have to be concerned about.

Mr. CUTLER. I certainly agree, Senator Cohen. Remember that the Attorney General in his preliminary investigation is denied many of the weapons that a prosecutor normally has. He doesn't have a grand jury.

Senator COHEN. No subpoena power.

Mr. CUTLER. He can't grant immunity; he can't issue a subpoena. And if an event occurred where there was, let's say, a meeting that might have violated the conflict of interest laws, or there was a statement that appears to be false and if it was intentionally false, it was perjury. You need to exhaust those means of investigation before you can fairly arrive at a conclusion of no intent. There might be some extreme cases where it is obvious there was no intent. A mistake of fact, for instance.

Senator COHEN. The Department of Justice is concerned that this particular act apparently is not subject to the Gramm-Rudman-Hollings targets and that there is an extraordinary waste of taxpayer dollars involved in these kinds of investigation. The Depart-

ment advocated that the purse strings, in essence, be controlled by the Attorney General for the investigation. Would you support that?

Mr. CUTLER. I cannot imagine that the amount involved in all the investigations or prosecutions to date could even be found anywhere in the federal budget or even in the Department of Justice budget as even justifying a separate line item. I would say no because of the suspicion that would be raised that budgeting and control over expenditures would be a means of controlling the investigation.

Senator COHEN. Former Attorney General Civiletti is going to be testifying shortly, and he will indicate that Congress should consider eliminating the provision allowing judicial review of the decision to remove the independent counsel. Would you agree with that position?

Mr. CUTLER. I think it is important that the power to remove the independent counsel be not a power to remove at will but only for cause, incapacity, et cetera, as you have provided. I think that normally where such a provision exists there is a power of judicial review whether it is specified or not.

For example, in the Humphrey case, the Federal Trade Commissioner who President Roosevelt in effect removed although the statute said he could only be removed for cause. He obtained judicial review of his removal and he won his case.

I don't see why it cannot be reviewed at least on the issue of whether it was for cause or for a political reason, as it was in the case of Mr. Humphrey. Whether it should be an extensive review of the fact and the law, that kind of review may be too strong a review.

I would not object to Mr. Civiletti's proposal, but I would still leave it that, as in the Humphrey case, you are not taking away whatever power of judicial review would normally exist.

Senator COHEN. My time is up. Thank you.

Senator LEVIN. Mr. Cutler, just a couple of additional questions relative to the matter of intent and as to whether or not it ought to be considered as part of that preliminary investigation. You addressed yourself to that this morning. The Attorney General, as I indicated, looks at intent in phase 2 in determining whether to proceed to a preliminary investigation, but given your testimony this morning, I would like to ask you a little further about intent during phase 3, the preliminary investigation phase.

How can we prevent the excessive utilization of intent and investigation into intent in phase 3 from being used as an excuse not to appoint an independent counsel? The Attorney General says, "Gee, we've done a thorough investigation of intent and we've decided that there won't be a conviction in this case based on that so we're not even going to recommend an independent counsel." You said there should not be that kind of determination of intent by the Attorney General, because he doesn't have subpoena power at that phase, doesn't have a grand jury capability at that phase, and for another reason—because that is the place where bias is most likely on the part of the Attorney General, at that phase, in terms of political cronyism.

How do you draft a statute or an amendment to this statute to prohibit that? Do you have some ideas on that? I'm trying to get some free legal advice here.

Mr. CUTLER. I think you are on the right track by saying that the need to seek the appointment of an independent counsel cannot be avoided simply by a finding of the Attorney General alone that the individual under investigation, although there is no question he committed an act, lacked the requisite criminal intent. It is somewhat Draconian. I would admit that. You can think of cases, I suppose, where a man makes a mistake in a date and that turns his statement into perjury, but it is perfectly obvious, without grand jury subpoenas or immunity to witnesses or anything else, that it was just a simple mistake in speech or something. In those cases the Attorney General ought to be able to say no further investigation is needed.

Senator LEVIN. How would you define that class of cases?

Mr. CUTLER. It is very hard, but I suppose one could find language that fit just what I said.

Senator LEVIN. Do you have any further thoughts on how we might devise that?

Mr. CUTLER. I haven't, but I would be glad to work with your staff on appropriate language.

Senator LEVIN. Senator Cohen.

Senator COHEN. What are your thoughts about the so-called backup appointment of Judge Walsh that was arrived at with the Justice Department?

Mr. CUTLER. I think it is a sort of belt and suspenders approach. I would like to see this issue resolved once and for all. I have been out of the country for a week or so, but I take it the Attorney General did not make a backup appointment in the case of Mike Seymour. So I suppose it will be resolved. We might as well get it over with.

Senator COHEN. The problem is that we have a provision in the act that would require the disqualification of any employee of the Justice Department serving as a special prosecutor. So that is coming under attack as well, that it may have nullified the special status of the independent counsel by virtue of now being considered to be part of the Department of Justice. So it does raise another legal issue which is in fact being explored by one of the defendants.

Mr. CUTLER. It might have to be retroactively withdrawn, I suppose.

Senator COHEN. On reimbursement of counsel fees, the Attorney General's office recommended that the reimbursement be limited to the per diem rate that is given to the independent counsel. Any views on that?

Mr. CUTLER. This is a very thorny situation. It is one that comes up, as you know, in Title VII civil rights cases and also some other places. If there is an issue of serious overcharging, it seems to me the court can always take care of that, and it did indeed reduce the charges submitted, I think, in Mr. Meese's case, although what was approved probably exceeded by some margin the per diem of the independent counsel.

I think we are doing this to assure public confidence that the official under investigation by the independent counsel gets a fair shake. He is being subjected to an additional burden. Not only did we have the preliminary investigation by Justice, which cost him and his counsel a lot of time and money, but now we have the independent counsel's investigation. I think he is entitled to the best legal defense he can get, and that, subject to court approval of the amounts, prevailing private fees ought to be the standard.

Senator COHEN. Thank you very much.

Senator LEVIN. One additional question. Senator Cohen yesterday solicited very interesting information from the Justice Department relative to good cause removal. I just wonder if you would comment on that. The Justice Department was asked by Senator Cohen to define what would constitute good cause under the statute for removal of an independent counsel by the President, and Mr. Bolton said that if an independent counsel failed to follow any lawful order by the President that would be good cause for removal. What is your understanding of that?

Mr. CUTLER. I would totally disagree with that. It seems to me it is of the essence of this situation that the President, because of his personal and political conflict of interest, is disqualified from the giving of orders. Certainly orders relating to the conduct of the prosecution. Good cause means misconduct; it means taking a bribe, committing an impropriety.

I don't want to get into Ms. Morrison's case, but perhaps in a situation in which Mr. Walsh, to take an extreme situation, or a member of his law firm took on the defense of Colonel North, it seems to me removal would be called for in a case like that. That is what it ought to be, but most definitely not failing to obey an order of the President, or the Attorney General, for that matter.

I might point out, since so much is made of the Myers case in Mr. Bolton's testimony, that in the Myers case Chief Justice Taft made an exception for certain executive officers as to whom removal at pleasure might not be appropriate, and what he had in mind were quasi-judicial types of officers, fact finding types of officers. They didn't use the term then, but administrative trial judges, for example, in the Executive branch.

You will also find in Justice Brandeis' dissent in that case there is a long list of all of the removals from office of executive officers by the President, listing those that were made for cause and not for cause, and out of those you will see some standards. Somebody would have to do some research on it as to what the cause actually is.

Senator LEVIN. Thank you very much, Mr. Cutler.

Mr. CUTLER. Thank you, Mr. Chairman.

Senator LEVIN. Our next witness is a distinguished lawyer in Washington at this time. He is a former Attorney General under President Carter. Ben Civiletti oversaw the original implementation of the independent counsel statute, including cases involving Hamilton Jordan and Timothy Kraft.

Mr. Civiletti, we welcome you today and we are grateful for your appearance.

TESTIMONY OF BENJAMIN R. CIVILETTI, OF VENABLE, BAETJER,
HOWARD, AND CIVILETTI

Mr. CIVILETTI. Senator Levin, Senator Cohen, it is good to be here. I have submitted and hope you will accept for the record my written statement.¹ I won't bore you by referring to it very much.

Senator LEVIN. We thank you for that statement. The entire statement will be made a part of the record.

Mr. CIVILETTI. I have a few observations to make and then will be happy to try to respond to questions which you may have.

First, I think that you and the committee and the Congress did a fine job in 1983 in improving the Act and strengthening it. Despite whatever nuances or concerns that may exist 5 years later, I think it is a far better Act now. I think the exercise of it has been far better, and although we have, I think, seven or eight independent counsel, I think that the Act is by and large, for its main objectives and purposes, working reasonably well, and that it would have been in great danger had it been left unattended in 1982. So I commend you for that effort and for those changes which I think have proved out.

I think that the Act ought to be renewed. I disagree with Attorney General William French Smith and with others who suggest that it serves no useful purpose and that it is wasteful and detrimental. I still have a very strong feeling that the Department of Justice, in the absence of the Act, its career professionals could perform in substance the duties required of it well, but I am persuaded that the perception in special circumstances of an uneven playing field and the public's suspicion or lingering doubt in special cases is best removed by this provision that now exists, and the trigger that now exists.

I think it is designed primarily as an extraordinary act to deal with extraordinary circumstances, to fulfill in substance and perception the commitment to equal justice. No one stands above the law or below it, and the application of the criminal law is not influenced by political favoritism or by conflict of interest. No one has received special treatment. It assures, in effect, in both substance and in perception, that we are on a level playing field.

Of course, in trying to reach that goal it creates by its very nature a great many dangers that run counter to the very purposes of the Act, and I think that the Congress has balanced those dangers against the objectives and has come up with a very fair balance.

Among the dangers are the limited accountability of an independent counsel. In terms of time, scope of work, diligence, techniques used, and experience, the Act and the process is terribly dependent upon the individual, and we as Americans and under our Constitution like to balance that kind of dependency with the protections of procedure and due process, and that is very difficult to achieve in the first instance in the decisional area by the independent counsel process. So it is weighted very heavily in its performance on the caliber and capability of the individual, more so than, of course, in the Department of Justice process where we have

¹ See p. 265.

enormous numbers of procedures and processes and any number of individuals as well as traditional oversights and investigations and access by the press.

That weakness, in part, has been strengthened by the amendments in 1982 dealing with the independent counsel's relationship with the Department and its practices and policies, which I think are essential in order to secure the benefits of less dependence on simply individual whim or individual good faith variance among interpretations of the criminal law or prosecutorial policy.

The third danger is that unlike most criminal investigations, preliminary stage, secondary stage, even the third stage, until they surface with a filing there is a certain confidentiality about them. It is breached occasionally. It is very important that we have full-blown investigations, vigorous and thoughtful, but that we not taint and blacken people who are subjects of investigation, who come into an investigation—and there are many, many such folks, of course—who have had no criminal liability or are proved to be not subject to prosecution whatsoever, that they not be tainted and embarrassed and prejudiced and lose their jobs or savings simply because there are investigations.

Grand jury secrecy is one traditional procedural care to guarantee that. There are many others. The Department of Justice's strictures with regard to the statements they can make with regard to pending investigations before they surface, and to criminal cases, and a whole series of such things.

Well, the independent counsel process is difficult to coincide with those protections. They are subject and their dealings are subject to rather exceptional public knowledge and visibility. That cuts lots of different ways. It makes an investigation more difficult when it is done while known to a great many people. It puts a rather exceptional additional pressure on independent counsel, because they are being judged, so to speak, or might be judged, particularly someone who is midway in their career, on whether or not they make the case, as to whether they are a fine counsel or whether they have other ambitions, whether they are successful. And of course it prejudices the subject, because rather than in the ordinary criminal process that until indicted or charged you are not unfairly prejudiced, in this instance the appointment process and the investigative process are so newsworthy that the subjects become known rather rapidly.

Lastly, and perhaps most importantly, there is a risk, although I don't think it has been realized, that the mere investigation by the independent counsel, the appointment process, debilitates enormously the office or the area of the government from which the investigation springs. Of course, it is not the intent of the Act or the intent of any Department of Justice investigation or the intent even of the criminal law to debilitate the government in any important area or role.

So with those dangers in mind, my testimony which I have submitted cautions against expanding the Act as to the people to whom it is applicable. Because it is extraordinary and exceptional, I think it ought to be limited, and if I were to do anything, I would limit the scope of the Act even further.

I counted up the number of people who are now subject to the Act in its main specific provisions without regard to the catchall conflict of interest provision, and it is approximately 120 or more folks. Certainly, if I was going to err, I would err on the side of reducing the number of people within the specific scope of the Act by identification and I would keep the catchall phrase of conflict of interest which is now in the Act for a case-by-case analysis.

The second thing that I would guard against in these balances, keeping in mind the purposes and objectives of the Act and its having served well as against the dangers which are inherent in it, is expanding the congressional, the court's or the citizens' role in any part of the Act. There is a natural tendency to do that, I think, but I think it is important not to do it so that we don't tamper with what I think is a sound division and a sound application of the law, constitutionally viable within the separation of powers, clearly, and I think that ought to be preserved.

Secondly, the special counsel or independent counsel has a difficult job under any circumstance. To the extent that we expose counsel to additional tasks or diversions, litigations, layering of litigation, challenges by citizens of one kind or another, reporting to Congress periodically, I think we unnecessarily burden his task and divert him from the timeliness of what I think is important to the Act and this role, that in these exceptional circumstances the best counsel available be chosen and get to the job as quickly as possible, and get it finished.

Of course, to the extent that there are other burdens placed on independent counsel or other avenues, always in good faith, to enhance either accountability or to enhance compliance with the Act, you run the danger of manipulation by one group or another group by allowing some further role in the process.

With regard to what Mr. Cutler said, I generally agree with his testimony, which I found full of the same wisdom that he has displayed in so many other areas. I have three points of disagreement with him.

One, I did not follow and I do not think it is quite a sound argument to say that because of the statute we now have the current Attorney General and that therefore in the future the statute may be a good thing because we will have other Attorney Generals we may not have without it. I don't think that is a very sound argument one way or the other, nor do I think it is particularly accurate.

The panel idea, which he suggested, I think, in 1982, and again today, has some theoretical merit, but if we had had such a panel of three to six we would have exhausted them long before now, and I don't know then what mechanism we would have used.

That brings up a subject which is difficult. The court now, I think, has been reasonably successful in choosing and getting very good people to serve as independent counsel. But with seven on board and having gone through the process several times, I think if we had three or four more over the last couple of independent counsel, just from second- and third-hand information, I think the court has had a little difficulty in promptly being able to select and get people to serve. That goes to a suggestion that I heard earlier from one of the questions about whether there should be a commit-

ment that the independent counsel be full time. I think that that is dangerous.

I think that most independent counsel will devote either full time or a majority of their time to the task, but I think to make it full time would require them to sever and uproot some other responsibilities that they could carry left handed in their traditional affairs and devote what essentially is full time or three quarters time or two thirds time to the task. I think by putting the full-time requirement in you would lose more in terms of those that would have to turn down the position that you would gain by getting the extra 25 percent of their time or extra third of their time.

So I think if you wanted to have a measure, I would put a measure in the statute that said something to the effect that it will be expected or it will be a condition of appointment that a majority of the time of the special or independent counsel will be devoted to the tasks.

If you are going to also deal with diligence and if the timeliness was important for lots of reasons, I am concerned about that, because lawyers have a way when they are working on matters sometimes, in particular under hourly rates and with the sophistication of the law, to work and work and work and work and exhaust every possible avenue and look under every piece of straw to see if there is something hidden.

Senator COHEN. You don't do that on contingent fee arrangements, too?

Mr. CIVILETTI. No. I don't think so.

I think you ought to consider perhaps either some hortatory language in the history of amendments, or maybe even devise something in the terms of the statute that would reinforce what I think is the independent counsels' desires anyway, but something to the effect that to the extent an investigation by independent counsel and proceedings can be conducted within a year that they be conducted within a year; to the extent that it takes two years or longer, that every effort be made to be finished within two years; and only in those extraordinary circumstances would it be expected that an independent counsel's role would continue more than two years except for pending proceedings.

That is only a top-of-the-head thought, and it is not easily converted into legislative language, but the sense of it is there.

With regard to some of the questions that you asked Mr. Cutler, which indicated to me a concern about the differentiation between the triggering of the 90-day period under a statutorily intended preliminary investigation, an inquiry preceding it without statutory trigger and without the consequent reporting within a short period of time, or the filing of a request for independent counsel, I can't quite determine if that is good or bad. In frivolous cases and meritless cases, in terms of the people we are trying to cover and protect against in our objective, we don't want the special prosecutor or independent counsel Act triggered. None of us wants that. Where there is no merit, where it is suspect to manipulation, where the people are simply sick people who are making the allegation, or where they are unfortunately haters or opposers of a particular Administration and want to make trouble, and where the allegation is that the Secretary of State is a crook or where the

CIA director is conducting domestic surveillance in opposition to the law, where they are so general, we don't want to trigger the Act; we want to go through the regular process of making a discrete inquiry.

We only want to trigger the Act and the 90-day period when there is a serious allegation against one of the covered officials that has reasonable credibility behind it about a specific course of conduct or a series of courses of conduct, and then do a quick investigation, and if we can't determine that there are no reasonable grounds to proceed, end it; or if there are reasonable grounds to proceed, then trigger this very special mechanism. So that it is serious and so that the dangers that are posed are necessary to be faced, and so that the public perception of an even playing field is maintained in those few cases where there is some serious doubt about whether that could happen.

I think a decent, fair way to look at it and to kind of balance it is if we had in place a special counsel system for the Senate and the Congress, or for the judiciary committees respectively of each house, because of the intimate relationship between the Justice Department and those committees, the oversight, the budgetary responsibilities, the closeness of the communication, that in any circumstance where there was an investigation of a member of such a committee or potential investigation we would have an independent counsel. You would not want an independent counsel in those circumstances as in these other circumstances unless there was a specific allegation, reasonably credible, and after a short preliminary inquiry could not be satisfactorily disposed of. You would want it in those rare circumstances, because the dangers on the other side, all the dangers that I have indicated, and more, of prejudice, of disability, of unnecessary public doubt, would be very substantial.

Returning to the pre-preliminary investigation or inquiry problem and the preliminary investigation. If it is a timing problem, if the reason this is being done is timing—and that is the primary motivation for doing it—then consider relaxing the time, 90 days to 120 days, or 90 days to 150 days. If the reason is because of the cost and the extraordinary nature of independent counsel, before triggering independent counsel preliminary investigation and having to make the decision of doing it, the Attorney General is trying to weed out those cases which truly were not intended to be covered, then it may not be a bad thing. It may be, in fact, desirable, even though it looks like it massages the Act more than the Congress intended.

If, on the other hand, the purpose or objective is to defeat the Act, is to in serious cases conduct an inquiry, conduct a preliminary investigation under the label of an inquiry, then that is wrong, and it ought not to be done, and in those kinds of cases where that is the circumstance,—I can't fathom what the motivation would be or the intention would be—but if that were truly to be done, then I think an extension of the time and perhaps a requirement of a report would be desirable where the first knowledge in the Department of Justice extended more than 60 days without the time for the preliminary investigation having been triggered. Then the report of the inquiry also would be made to the court. Be-

cause you don't want to bog down the court or the Attorney General with reporting frivolous cases or meritless cases even though it may take him a little inquiry to make these.

I can understand some good reasons, but I can't understand a poor reason, why you would manipulate the Act to have a long period of inquiry before you triggered the preliminary investigation time. Under the old Act, which I dealt with, the 90-day period, which I sought, I think, in 1982 to have extended and there was an extension provision on grant, I think, put into the amendments, was triggered upon the first receipt of information alleging as to an individual, alleging a specific course of conduct which amounted to a criminal act. Although we had to hustle in those 90 days, we did not have the latitude or flexibility to say, well, before the trigger is filed there is not specific or credible enough information.

Those two standards are necessary in making the decision of whether to conduct this expensive preliminary investigation. I agree with their imposition in the Act, and they are also necessary and helpful in determining whether to seek independent counsel. They really are not critical to the timing trigger.

Those are just my observations.

Senator LEVIN. Thank you, Mr. Civiletti.

Picking up on that point, one reason why the preliminary investigation stage might be avoided with a long pre-preliminary investigation would be to avoid a report to the court.

Mr. CIVILETTI. It's not a very good reason.

Senator LEVIN. I couldn't agree with you more. At least that is one of the reasons. It does avoid that report. So that is a clear difference in the two areas.

Let me get to a different point. Yesterday the representative of the Justice Department said that the Justice Department has grave questions about the constitutionality of this statute, and that that position reflected a long line of Department of Justice precedents.

Can you tell us what the Department of Justice position was relative to the constitutionality of this Act when you were the Attorney General?

Mr. CIVILETTI. I can tell you what I think it was, to the best of my recollection, but I have not reviewed any of the documents or historical contemporaneous materials so I could be proven slightly wrong. In order to answer your question in context, I think I need to go back a little bit.

When the Act was passed in 1978, Griffin Bell was Attorney General and I was either Assistant Attorney General of the Criminal Division or a new Deputy Attorney General. John Harmon was the Assistant Attorney General for the Office of Legal Counsel.

It is my recollection, although I was not closely involved, that the Department debated long and hard about the constitutionality of the Act and the design of the Act, principally around the separation of powers. We finally came to the conclusion, we, the Department, and principally the Office of Legal Counsel, that the Act was constitutional. Griffin Bell came, I think, to the personal conclusion that it was constitutional, although we were always aware that there were sound and good arguments, but not persuasive arguments, that it infringed on and abraded to some extent separation of powers.

As a policy matter, there were many within the Department, myself included, that were not great admirers of the Act. Not because it wasn't a decent attempt to do something, but rather because we were greater admirers of the day-in-and-day-out integrity and ability of the Department of Justice, and we thought that the Act unfairly diminished that.

Putting that aside, when I became Attorney General in 1979, I had concerns about the constitutionality of the Act, which were the same concerns that had been debated and discussed and reviewed in 1977 and 1978. But on evaluation, and on the whole, I thought that the Act was constitutional, because the role of the court was a limited role, ministerial in part, and because historically the court had had such limited participation in inferior officers' appointments of one kind or another, most particularly U.S. attorneys in the absence of a confirmed U.S. attorney.

Secondly, the lines between the separation of powers, I think, in this area, as well as in foreign policy and lots of other areas, are not clear, bright, concrete, or granite-like lines. There is flex between the separation of powers. There is give and take; there is tension. Otherwise, they wouldn't operate as a system if they were finite and brittle. I think it is one of those areas in which there is some flex.

The third reason I thought at the time and think now that it is constitutional is that if this is a perceived and acknowledged objective, if there is this narrow field of purpose, I think this is the best and perhaps only way in which to deal with it. It is an argument almost by necessity.

So for all three of those reasons I think it is constitutional, although I would not be surprised to have voiced in the Department of Justice in 1977, 1978, 1979, or 1980 that there were grave constitutional concerns about it.

Senator LEVIN. The testimony yesterday of the representative of the Department of Justice was that his testimony followed a long line of Department of Justice precedents. We will make part of the record the testimony at the time the Act was introduced and adopted by John Harmon, whom you referred to, who was the Assistant Attorney General of the Office of Legal Counsel of the Department of Justice.

Part of that testimony reads that the Department has "no objections to the manner in which the appointment process is initiated, the method of judicial appointment, or the restrictions placed on the executive's power of removal over the special prosecutor." And his testimony that "we believe the judicial appointment is justified by the appointments clause." It includes testimony that the "circumstances surrounding misconduct by high level officials and the need to preserve the appearance of justice would warrant a judicial appointment." And his testimony that the "extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the executive's power of removal in this instance."

Those are just excerpts from that testimony.

The testimony you have given us this morning is that the Attorney General should rarely recuse himself—I am now taking you to a slightly different issue while I still have a moment left. On the

recusal issue, should the Attorney General recuse himself when he has been involved in the underlying facts which are the subject of the criminal investigation?

Mr. CIVILETTI. Probably. That is not because of any specific statutory requirement that is either desirable or necessary, but that is just common sense under Department conflict regulations and the Model Rules of Professional Responsibility.

Senator LEVIN. I am going to end my questions there, in light of the hour.

Senator Cohen.

Senator COHEN. I think you have suggested, Mr. Civiletti, that we ought to reduce the coverage of the Act even further than we did in 1982. If that were to be the case, if we were to follow your recommendation, my understanding is that Mr. Nofziger and Michael Deaver would not have been covered.

Mr. CIVILETTI. They would not have perhaps been covered expressly, but they would have been covered under the catchall conflict provision.

Senator COHEN. But the catch-all conflict provision is discretionary. If we reduce the specified members of that high government official group, would you then make the catch-all provision mandatory?

Mr. CIVILETTI. I think that is hard to apply, but I think that is a reasonable trade-off. If I didn't make it mandatory, then I would say that it be applied with the utmost perfection.

Senator COHEN. You have also proposed that judicial review for removal of the independent counsel be eliminated for constitutional reasons. Would you articulate those?

Mr. CIVILETTI. I don't think it makes the constitutional frailty argument a winner, but it clearly aggravates the argument, because it involves the court not only at the selection process, which is, I think, constitutionally firm, but when it brings the court back in in the review process specifically by statute, then I think it aggravates, although not winning again.

I think Mr. Cutler is right in saying if you simply eliminate the review provision, not saying that it shall not be subject to review and not saying it shall be subject to review, the court will fashion its own limited review to see if there has been some great abuse occurring or some absence of right.

The second reason is that there are lots of ways that have not always been utilized or discovered yet about tying up special prosecutors. From the subject's point of view, from the Department's point of view, or other points of view, third party interests, one of the best ways is through litigation. I am not in favor much of extra litigation, and it is an extra litigative tool.

Senator COHEN. You sort of slipped over a statement, and I will let you go back and review for a moment. You said you believe the selection by the court is constitutionally infirm.

Mr. CIVILETTI. No. The other way around. I said that the argument attacking the statute on unconstitutionality is constitutionally frail in that it incorporates appointment and this review of removal. I said that the appointment process, I think, is constitutionally firm and sound, and I also think on whole that even the limit-

ed review is constitutionally sound, although I think that it is an unnecessary aggravation of the argument.

Senator COHEN. Do you think that the Department ought to make a pre-preliminary determination of criminal intent before the Act is triggered?

Mr. CIVILETTI. I think intent is an intriguing and fascinating subject and issue, but I do not think we ought to get tremendously excited about it. Because it is very similar to, with one major exception, any other element of a crime. Some crimes have two elements; some have four elements; some have five elements; and intent is usually, in the felony crimes, one of those elements. We don't parse out in our statutory language or in sufficiency for indictment and say, well, you have to have greater proof or lesser proof of one element or the other. We simply say here is the standard. You review the elements as to whatever the standard is, if it is investigation or if it is indictment or if it is conviction.

The one big difference with intent is, of course, that it is very difficult to prove, that it is elusive, and it requires, a lot of times, a very close evaluation of the credibility of two people.

Senator COHEN. Should that be done at the pre-preliminary stages?

Mr. CIVILETTI. I think under the statute, as you have it, it is very easy. If you have got two people who are reasonably credible and it is a battle of wits, you have got to have an independent counsel. You don't have any choice. If you have a credible witness and you have ten witnesses on the other side, one to ten, then you have no choice. Because you can't simply by the number of witnesses say one is not entitled to belief and the other is. Given all other facts being the same, you have got to go ahead with your preliminary investigation, and probably at the end of it, if you are in the same position, you have to have the independent counsel.

For instance, if there is a meeting at the White House and there are 42 people present, 10 of whom are the Administration and 32 who are outside the Administration, and the President and two or three cabinet officers have a wonderful time and thank these people for their support, hope they will continue to support the Administration, and they all leave. That is the evidence from 41 witnesses. And one guy who leaves afterward says when I was in there my arm was twisted. They asked me for a million dollars of contribution. Clearly, they said if I didn't do that they were going to sick the Department of Justice on me, or Transportation, or whatever, and it was outrageous.

Senator COHEN. That has to do with credibility versus intent, doesn't it?

Mr. CIVILETTI. That is 1 to 41.

Senator LEVIN. That is not an intent issue.

Mr. CIVILETTI. If he is testifying they did that, he is reading the intent of the President or the cabinet officers a certain way from the language. That is what he is kind of arguing, that they had the intent to solicit funds in the White House, which is a criminal act. In that circumstance, where everyone else, both independent of the Administration and within, swore under oath, and this one fellow who has no other evidence other than his interpretation of the events, that is the kind of environment where a preliminary inves-

tigation might well be necessary, but there ought not to be an appointment of an independent counsel. The question is just too remote.

Senator COHEN. We don't have a problem with that. That is contemplated by the Act itself. What we are having a problem with is the Attorney General, before ever getting the preliminary investigation, making that determination and therefore never having to file anything with the court indicating why he was rejecting it for lack of specific, credible information.

Mr. CIVILETTI. What I am suggesting, though, is that if there is, without reasonable difference of opinion or doubt, no intent arising out of the circumstances, there ought not to be any preliminary investigation just as if there were some other element of a crime that was missing. If there was no murder, then there ought not to be a preliminary investigation. Intent in terms of an elemental evaluation, if it is absent, ought to be no different than any other element as to whether to trigger a preliminary investigation or trigger the appointment of the prosecutor. The difficulty is, and what you are asking is, because intent is so hard to measure, should it be boxed out of either the inquiry investigation or the preliminary investigation? I think not. Because it is my view that every prosecutor and every lawyer who deals with criminal cases knows that intent is so difficult to determine that, unless very clear, it is seldom used as the basis for not going forward with an investigation or with a case or appointment of independent counsel. It is just an issue which doesn't drive the machinery. If you found and are convinced that it is being abused as an instrument to knock out cases where there is doubt on either side that it should go forward——

Senator COHEN. We have no way of knowing that. That is the point we are making.

Senator LEVIN. Finish your sentence. What do we do? If you are convinced that it has been used improperly to stop a case from even getting to a preliminary investigation or getting to an independent counsel, then what? I have no doubt that the intent issue has been used even to block a preliminary investigation.

Mr. CIVILETTI. I am not saying that intent ought not to be used in the proper circumstances where the evidence is absolutely clear that there was no intent. That is true in a lot of cases. What I am saying is I am very doubtful that it is used where the evidence is in equipoise or there is strong credible evidence of intent even though there may be substantial evidence of no intent. In that environment I would be very surprised if that was the principal element for not going forward.

Senator LEVIN. If you would yield, Senator Cohen.

Let me just give you the government statement in the Schmults case:

The investigation conducted in this matter and the facts just recited may well be thought to show negligence on the part of Mr. Schmults. The facts do not, however, make out the evidence of a corrupt motivation or criminal intent on the part of Mr. Schmults. Proof of criminal intent is a necessary element of any criminal prosecution, and here there is insufficient evidence of criminal intent to warrant a judgment that there is a reasonable prospect of conviction if a criminal case were brought against Mr. Schmults based on this allegation.

Now let me tell you about the Schmuls facts. You say you don't have any reason to believe intent has been used. In the Schmuls case there were some documents that the Congress wanted to get. The Justice Department exercised executive privilege to stop those documents from going over to the Congress.

Then Congress issued a subpoena. At that point the Justice Department decided, okay, we're going to send over these documents.

What Schmuls did was take out from those documents some very critical handwritten materials before they went over to the Congress and did not disclose that to the Congress. This is after a battle over whether any documents would go to the Congress, a subpoena, and then a decision to send the documents to the Congress, presumably including all of the documents.

Schmuls purposely—there is no doubt about it, and he acknowledges it—willfully, consciously withdrew certain handwritten notes from those documents. That is all set forth in the report—that the purpose was there to withdraw those documents.

But the Attorney General talks to Mr. Schmuls, and Mr. Schmuls said he never intended to mislead the committee. That's his statement. The Attorney General says there was no intent here—he denies that he ever intended to mislead anybody. You've got the facts showing, at least to some reasonable people, I would think, a conclusion that he intended to mislead the committee by not enclosing documents which they expected and had a right to expect. But he has his own statement.

That is all you have on the record in terms of specific evidence, explicit evidence of intent—Schmuls' own statement that "I never intended to mislead the committee." The Attorney General says that's all we've got is his statement—"I never intended to mislead the committee"—so there is no evidence of intent.

So when you say that intent hasn't been used to avoid moving to an independent counsel, it seems to me you are ignoring not only the Schmuls case but a lot of other cases.

Mr. CIVILETTI. I said I doubted it. That's all I said. I don't know if it has or not.

Senator LEVIN. I am not sure I am perfect in every detail of those facts, but assuming those facts and taking them abstractly, forget the name of Schmuls and pick some other case. Take a person who allegedly engaged in those acts. Would you say there is sufficient evidence of intent in that case, in that situation that I am now turning into a hypothetical, to get to an independent counsel?

Mr. CIVILETTI. No. Suppose the substance of all those handwritten notes had been in typewritten form in other things that were turned over.

Senator LEVIN. They weren't.

Mr. CIVILETTI. The second thing is, what was taken out in handwritten notes? What was the purpose of doing that? What were the objectives? Was it because it wasn't relevant to the inquiry? Was it because it wasn't timely? Was it because you are trying to protect a minority figure? I can't tell from that hypothetical. But I agree with you.

Senator LEVIN. None of those things. The answer to your question is that he wanted to avoid a battle with the Congress.

Mr. CIVILETTI. I applaud the motivation; I don't applaud the technique of avoiding the battle.

I think in the circumstances that you pose, my point and my decisional basis would be that although that statement is very relevant and it is very important and it can be at certain times critical, you cannot base a decision on intent on the statement of the individual. That is only one part of an evaluation process. You have to look, as you have properly looked, at the circumstances of the other transaction, the circumstantial evidence, the nature of the course of conduct which is being engaged in, the number of people who knew of the events and knew of the removal or non-removal; was it secreted or was it not? Was it common knowledge? A whole series of circumstances.

Until you get to the charging phase you cannot base alone in isolated fashion your decision on the element of intent on the statement of the putative subject. It is an important part.

Senator LEVIN. Just to pursue that for a minute, because I am interrupting Senator Cohen, if we had an Attorney General who thought you could, if that was the position of the Attorney General, how would you remedy that? By statute? Would you write in some standard there like the one you have given about you can't base intent just on statements of denial or explanation of the person who is being looked into? You have got to look at all the facts and circumstances? How would you correct this problem if we thought it existed?

Mr. CIVILETTI. Are we talking about inquiry to preliminary or preliminary to—

Senator LEVIN. Both.

Mr. CIVILETTI. Then I would put in a provision, or consider one, rather than blocking out intent as a ground for action one way or the other. Instead of taking that out of the consideration, I would put a provision in 3 that said when evaluating specificity and credibility that if the element of intent is being considered under that standard, then a decision not to move forward with a preliminary investigation on the ground of intent cannot be based exclusively or primarily on the testimony of the subject of the investigation.

Senator LEVIN. Thank you.

I interrupted you. Thank you, Senator.

Senator COHEN. I was really asking a different question than the Schmuts case. I was trying to get to the pre-preliminary investigation. Do you think as a general rule that the resolution of the issue of criminal intent at the inquiry level rather than the investigative level is a valid standard for the Justice Department to apply?

Mr. CIVILETTI. If it is clear.

Senator COHEN. The point is, how do we know? Because if you resolve the issue at the pre-investigatory stage, there is never a filing with the court. So you are resolving a critical element.

Mr. CIVILETTI. Remember that that is done every day in the Department and by the U.S. attorneys around the country with high officials and low officials and important people and non-important people. We trust to the system and to their integrity and to the news when something is done corruptly leaking out sooner or later, which it usually does. So the newspapers even play their very vital role.

I wouldn't be too worried about the Attorney General process. I think probably in determining a preliminary investigation, or from a preliminary investigation to requesting the appointment or not requesting it, it still involves in most circumstances 30 lawyers, from the Public Integrity Section of the Department of Justice up through the Deputy Assistant Attorney General of the Criminal Division, to the Assistant Attorney General and then the Attorney General. I don't know if they do the Associate or the Deputy now. A lot of people have to be mixed up about it or be twisted about it in order for your concern to really become alive and be an important muscle in the rest.

If you are convinced, and most of those people are convinced after good arguments back and forth, and the Attorney General has exercised his integrity and said there is no intent in this case, no credible evidence of intent or specific intent to start a preliminary investigation, this inquiry is being ended without it, if he then had to file a report, the reach-back of the report isn't going to affect that judgment very much. If he has come to that conclusion based on intent, he can write a report that the court is going to read and say, well, fine, all right.

That is not much of a remedy. A much greater remedy is that to reach that conclusion the FBI has to ask some questions of people and run around; they have to file their reports; the line attorneys who are working with them have to reach some judgments. That is much more of a guarantee of decent decisions, along with, of course, the trustworthiness of the Attorney General and the Deputy and the rest, than is a report to the court.

Senator COHEN. I gather from your response to Senator Levin that in the cases involving the long extended inquiry phase prior to the preliminary investigation you would not have the resolution of the issue of criminal intent based solely upon the testimony of the person who was the subject of the investigation.

Mr. CIVILETTI. I don't have the same facts, and I also don't have the same concerns as you do even if there were some manipulation of the inquiry phase. Because by and large my concerns run to our having seven independent counsel now. If in three years we have 22, we have got a lot of trouble. Because we have got 22 unaccountable people out there; the scope of their investigations are stretching all over; some have been in office one year; some in office five years. What are we doing? That concerns me far more than the fact that in a half a dozen cases or a dozen cases the Attorney General and the rest of the Department has determined we don't even need a preliminary investigation.

So my concerns come at it slightly differently. If I shared your concerns and said, well, there is a danger here, we have a gap, the Attorney General is not announcing a full preliminary investigation, because despite whatever the other evidence is the Department is basing its decision on intent on the specific statement of the subject, and we are concerned about that, against the weight of the evidence or when the evidence is in equipoise he is not even doing a preliminary investigation because he is saying there is no intent based solely on that statement, then I would make the amendment saying that he shall not do that; it cannot be based solely on the statement of the subject.

Senator LEVIN. Or principally?

Mr. CIVILETTI. Or principally. Right.

Senator COHEN. A final point. We did amend the Act in 1981 to allow the Attorney General to consider the written or established policies of the Department in deciding whether or not to call for an independent counsel under the preliminary investigation. Do you think that there is no reasonable prospect that a jury would convict is a standard that the Justice Department ought to use?

Mr. CIVILETTI. When are they using that? At the independent counsel stage decision?

Senator COHEN. At the preliminary investigation stage?

Mr. CIVILETTI. That is not the appropriate standard there.

Senator COHEN. It surely wouldn't be appropriate at the extended inquiry stage.

Mr. CIVILETTI. No. It is not appropriate at the inquiry stage; it is not appropriate at the preliminary investigation stage; it may be appropriate at the independent counsel stage. Because it gets close to the grand jury's determination.

For example, it used to be that the standard for the grand jury to indict somebody was probable cause to believe that X committed the crime. That is a very nebulous and shaky standard. So when we evaluated it and evaluated how the Department went at that, we adopted prosecutorial standards and published them so there would be consistency in expectation and everyone would know the standard, in about 1979; that there shall be an indictment where there is probable cause to believe X committed Y crime and there is evidence from which a reasonable jury would convict somebody to the standard of beyond a reasonable doubt.

So that is how that language gets in there. I think it is sound for indictment. I think probably for the independent counsel if there is clear evidence that although there may be some facts indicating a crime but no reasonable jury would convict on those facts, then what that amounts to and translates into is there are no reasonable grounds to believe that further investigation or prosecution is warranted because there would be no indictment. I think that that is a logical and reasonable reach back.

However, if again there is evidence of a crime and anybody looking at it would say "I can't tell if a jury would convict or not, they may very well, there is some pretty good evidence here," then you have got to go forward with an independent counsel. There is no question about it.

Senator COHEN. The history behind that provision was the Hamilton Jordan case where he was singled out, evidence of a crime having been committed. But under established Department of Justice rules an average citizen ordinarily would not have been prosecuted by the Justice Department for that particular act. So in 1981-82 we amended the Act in order to not have a double standard in reverse. What has happened, however, is that "there is no reasonable prospect that a jury would convict" is now being used as the test to determine whether or not they should go forward with the recommendation for an independent counsel. Is it your testimony that that is not the appropriate stage?

Mr. CIVILETTI. I think it is appropriate there. Although there may be some evidence of an offense, the view is that there it is in-

sufficient for any reasonable jury to convict, then I don't think you ought to have a prosecution and I don't think you ought to have an independent counsel.

Senator COHEN. Don't forget that the AG at that point doesn't have subpoena power. It is very limited in scope what the Attorney General's office can do.

Mr. CIVILETTI. It is very often that you can't make that decision. You can't make it one way or another, and you have to appoint an independent counsel. Either because you need further investigation, or because you can't tell if a prosecution is warranted for the very reasons that you have suggested: no compulsory evidence, no immunity, no depth, and all the rest. If the facts come in bad, or all the facts that we could possibly get indicate no jury is going to convict, then you ought not to go further. Then it is an abuse of the process just as it would be an abuse of the grand jury process by an overzealous prosecutor.

We have to remember on the other side that the real problem in the criminal law is the enormous power that the prosecutor has. The real danger is the overzealous prosecutor, the overzealous Attorney General, the overzealous independent counsel.¹ If you are going to err, you err on the side, generally speaking, with the careful exercise of these enormous powers which are so devastating. Because we are at greater risk with their overzealous use and the destruction and the havoc that they wreak than we are with a more prudent, careful exercise, in my judgment.

Senator COHEN. Thank you very much.

Senator LEVIN. Thank you, Senator Cohen.

Mr. Civiletti, thank you so much for coming.

Senator LEVIN. Our next witness is David Martin, Director of the Office of Government Ethics, who has appeared before this subcommittee a number of times. We welcome you again, Mr. Martin. Would you please summarize your statement. The entire statement¹ will be made part of the record.

TESTIMONY OF DAVID H. MARTIN, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY GARY DAVIS

Mr. MARTIN. Thank you, Senator Levin. It is a pleasure to be here.

I have with me Gary Davis, to my right, who is the institutional knowledge of my office and has been there since the inception of the office. If you have any questions that you want to direct to him, please feel free to do that.

I am pleased that you are reconsidering now the reauthorization of the independent counsel provisions. I think it is extremely important that you do so and reauthorize them and that you consider all the advice that you have been given and that I have heard today. I think much of it is well taken.

You have asked me certain questions to address very briefly, and I will make a couple of points and then take questions.

One concerns the standards of conduct that are applicable to the Attorney General in the recusal process, if any.

¹ See p. 275.

Secondly, about the relationship of the independent counsels among themselves and the standards of conduct or laws that apply to them.

As regards the Attorney General, I do believe the standards of conduct apply to him, as set forth in the Department's standards of conduct. I also believe that the language of the independent counsel provisions make it very difficult for him to not act in most instances. I think the Act clearly contemplates a duty to act, and so therefore the normal standard of conduct on recusal I don't think can apply to him in that arena. I think he has to exercise what I would call a subjective test as opposed to an objective test, that subjective test being when he weighs all the circumstances, taking out the political and personal problems, which I think the Act contemplates being removed. I think he then has to say to himself "do I have a pecuniary or some beneficial interest in this matter that goes beyond a personal or political?" If he doesn't, then I think he has to act, and if he does, I think he has to recuse himself.

What standards apply to the independent counsels? Our office has given advice to the various independent counsels since this law was enacted. Consistently the advice has always been that you are subject to the conflict of interest laws and the standards of conduct, especially the standards of conduct at the Department of Justice. So therefore we have advised that the conflict of interest laws, particular sections 203 and 209 of Title 18, apply regarding representational activities, and that they were viewed as in most cases special government employees. Therefore there would be limited application of those statutes.

However, this year two independent counsels have received orders that in fact they are special government employees but that for purposes of sections 203 and 205 of the United States Code they are not to be considered as employees of the Department of Justice, but to be a separate special agency of the Executive branch. That has clouded the issue substantially for us, and we think that it is a matter that is right for this committee's consideration and that relationship should be resolved in any reauthorization that you make.

With that, Senator Levin, I would be pleased to take your questions.

Senator LEVIN. Thank you, Mr. Martin.

We understand that you have written the Department of Justice relative to the recusal of the Attorney General in the Whittlesey matter, that you wrote them on December 15.

Mr. MARTIN. That is correct.

Senator LEVIN. Have they answered the question that you posed?

Mr. MARTIN. The question has not been answered. I received a letter back saying that it is under advisement and that I will receive it.

Senator LEVIN. It is now two months later. You are just asking a factual question whether or not the determinations were made. Isn't that what you asked?

Mr. MARTIN. That's correct.

Senator LEVIN. Either they were or they weren't.

Mr. MARTIN. That's correct.

Senator LEVIN. After you wrote them December 15 and didn't hear from them, did you get in touch with them?

Mr. MARTIN. My chief counsel contacted Mike Shaheen on a number of occasions, and he said he was attempting to get the information and would get back to us. Then we received that letter. I forget what the date is.

Senator LEVIN. February 20.

We will make both your inquiry and the response part of the record.

Did you ask the Department of Justice for the same information relative to the Iran-contra matter?

Mr. MARTIN. No, I did not.

Senator LEVIN. Why not?

Mr. MARTIN. I had information that had come to me in the Whittlesey matter that I did not have in the Iran-contra matter, first of all.

Secondly, I think the President had indicated he would request that the Attorney General seek an independent counsel, so I didn't feel it was necessary for me to do that.

As to the first reason, I had an auditor over at the Department of State during this very period of time that the Whittlesey matter came up, and so I had a little bit of information about what was going on there, what appeared to be going on. My auditor was in contact with the inspector general. So I felt that I should send that over.

Senator LEVIN. What about in the Schmults matter? Did you make the same inquiry?

Mr. MARTIN. I never had any information or knowledge about the Schmults matter.

Senator LEVIN. You indicate in your testimony that there ought to be a separate, less restrictive standard on recusal for the Attorney General.

Mr. MARTIN. In the independent counsel arena I do believe there should be.

Senator LEVIN. Your standard is that the Attorney General should disqualify himself only when he has a "substantial pecuniary or beneficial relationship with the subject of the inquiry." Are you saying there ought to be a presumption against disqualification, or there ought to be a standard for disqualification, or both?

Mr. MARTIN. Probably both. The Act compels the Attorney General to act because of the very nature. It assumes that there will be, I think, a political or a personal relationship by the Attorney General with the President and with others. When the law was passed setting that mechanism up it contemplated that a personal or political relationship would exist. In that atmosphere and with that intent, as I read it, I think there is a duty to act, and that since there is a duty to act, he should act when the personal or political conflict exists, the institutional conflict, if you will. And that he should not act when there is something beyond a political or personal interest. Certainly if there is a financial interest he wouldn't act.

Senator LEVIN. As I understand your words here, you should disqualify yourself only when you have a "substantial pecuniary or

beneficial relationship with the subject of the inquiry." What does "beneficial" mean?

Mr. MARTIN. Let's suppose the Attorney General was to rate that person, to assess how that person has accomplished his job.

Senator LEVIN. In other words, this person is an employee of the Attorney General.

Mr. MARTIN. Employee or on a commission together; some relationship.

Senator LEVIN. A commission together? I am not following you.

Mr. MARTIN. Let's say they are serving on a commission together or some relationship that takes it beyond personal or political.

Senator LEVIN. Why serving on a commission?

Mr. MARTIN. Well, I'm not sure. I just threw that out as an example.

Senator LEVIN. Well, we are trying to understand the standard here that you are proposing to us. You say disqualify himself only when you have a substantial pecuniary or beneficial relationship. I don't know why being on a commission with somebody—

Mr. MARTIN. Maybe that was a bad example.

Senator LEVIN. What about if the Attorney General is involved with the facts underlying the case?

Mr. MARTIN. I don't think that would necessarily disqualify him.

Senator LEVIN. Do you mean if he is personally involved with those facts, had a personal involvement in those facts?

Mr. MARTIN. I think there is a compelling reason to act under this statute.

Senator LEVIN. Are you saying he should not disqualify himself?

Mr. MARTIN. I'm not certain.

Senator LEVIN. What about in the Deaver case where the Attorney General did disqualify himself? You are saying that under your standard he would?

Mr. MARTIN. I am not certain he should have, no.

Senator LEVIN. The same with Nofziger?

Mr. MARTIN. That's correct.

Senator LEVIN. What you are basically saying is that a personal or political connection, no matter how significant, should not be the grounds for disqualification; only if there is a substantial pecuniary or beneficial—whatever that word means—relationship.

What about the appearance standard? We are supposed to be worried about the appearance of things as well as the reality in this world. It is critical in terms of public confidence. Isn't there a problem when you have got someone serving with somebody else, for instance, who has a close personal relationship? How about if they are former business partners but no longer are? Should they disqualify themselves?

Mr. MARTIN. Without further facts, I am not sure. Under the standard I have set forth, I don't think so. Because I really believe that a statute has been written here that contemplates personal and political conflict. If a business relationship has been severed, if in the normal circumstances an attorney comes into the government, we advise them that even though you have severed all your relationships with a law firm or a client you really ought to recuse yourself anyway. That is kind of a subjective test. It goes beyond

any actual financial interest. It is more subjective. Under this statute the Attorney General is operating not within those confines.

Senator LEVIN. How about a personal relative of the Attorney General?

Mr. MARTIN. I think he probably ought to then.

Senator LEVIN. You would amend your standard at least to that extent?

Mr. MARTIN. Yes, I would.

Senator LEVIN. You think he ought to recuse himself if it's his sister or his brother?

Mr. MARTIN. Absolutely.

Senator LEVIN. So we at least have that much of an amendment we can put in your language.

Senator COHEN.

Senator COHEN. Mr. Cox yesterday recommended that the independent counsel ought to be required to refer any matter of evidence suggesting ethical misconduct to your office or some appropriate agency. Does your office already have the authority to review the independent counsel's investigation to consider whether there are grounds to investigate for ethical misconduct?

Mr. MARTIN. No. I don't believe our office has that authority. You are talking about in the context of the independent counsel?

Senator COHEN. Right.

Mr. MARTIN. No. I don't believe we have that authority.

Senator COHEN. After the independent counsel completed the investigation of Attorney General Edwin Meese your office apparently reviewed that report to determine whether there were ethical violations by Mr. Meese.

Mr. MARTIN. That's correct.

Senator COHEN. Was that of your own initiative or was it something that the independent counsel referred to you as a matter of course?

Mr. MARTIN. It was our own initiative.

Senator COHEN. So you felt you had the authority to undertake that kind of investigation?

Mr. MARTIN. To undertake standards of conduct potential violations, yes.

Senator COHEN. Jacob Stein, the independent counsel in the Meese case, indicated in his report that he did not have a mandate to investigate any ethical behavior, nothing beyond the criminal allegations. Do you agree that the independent counsel ought to consider only criminal allegations and not involve himself or herself in making assessments or proposals about potential ethical misconduct?

Mr. MARTIN. Yes, I think that ought to be kept clear and separate; the ethical and standards problem should be kept separate from the criminal.

Senator COHEN. In your judgment, if there is a case which involves apparent illegal conduct and unethical conduct, should the administrative remedy of your office precede or succeed the criminal investigation?

Mr. MARTIN. It should follow the criminal activity. Criminal penalties, we think, far exceed what might be envisioned on someone for a standards of conduct or ethical.

Senator COHEN. Let's say the case was so clear, that you have a serious allegation of illegal conduct, whether or not a jury were to convict or not to convict, that nonetheless on the basis of the allegations and the facts that were developed by the independent counsel you were satisfied in your own mind that that individual had clearly violated the ethical standards. You would not take any action to begin proceedings or to remove that individual or to suggest that he or she step down until the conclusion of the criminal process?

Mr. MARTIN. That's correct.

Senator COHEN. But that individual could be out of office by virtue of the time.

Mr. MARTIN. That is a problem, because that does happen. That's correct. But we just feel that we can't prejudice someone's rights in the criminal arena.

Senator COHEN. Two of the pending cases, the Nofziger case and the Deaver case, both involve this post-public service revolving door sort of proceeding. Have the independent counsels tried to coordinate their investigations with your office in any way?

Mr. MARTIN. We assist them in their understanding of the law. We assist them in the application. They have visited our office and seek our advice on just about every one of them. So we do work with them in that arena, in terms of developing the facts. Whether or not they go forward or what they do, we have no input into that aspect.

Senator COHEN. I don't know whether you covered this with Senator Levin or not. Shortly after release of the Attorney General's report to the court back in December of 1986 you asked the Office of Professional Responsibility within the Department of Justice whether any determinations had been made on the Attorney General's decision not to recuse himself in the Whittlesey case. You testified that the Office of Professional Responsibility advised you on February 20 of this year that they had initiated a review to answer your inquiry. Have you received a report since that time?

Mr. MARTIN. Senator Levin asked this. I have not, Senator Cohen. We await that.

Senator COHEN. Does that sound like an unreasonably long period of time to you?

Mr. MARTIN. Yes, it does. As I said to Senator Levin, my chief counsel has been in touch with Mr. Shaheen and he assures us he will be responding.

Senator COHEN. So your office is at least trying to gain access to that report?

Mr. MARTIN. We are trying to receive information from Mr. Shaheen. Whether or not there are any reports attached to it I don't know.

Senator COHEN. Would you give us a copy of that report when you receive it? ¹

Mr. MARTIN. Whatever I receive you certainly can have a copy of.

Senator COHEN. That's all I have, Mr. Chairman.

¹ See p. 441.

Senator LEVIN. Thank you, Senator Cohen.

The new standard which you are proposing would be a significant change from the existing standard at the Justice Department which the Attorney General applies to himself; is that not correct?

Mr. MARTIN. In terms of the recusal?

Senator LEVIN. Yes.

Mr. MARTIN. Yes, it would be. What I am proposing is really a subjective standard. Certainly it would be the furthest extent that one could take in terms of recusal. However, that does not mean that if subjectively the Attorney General or a deputy Attorney General, if they were deciding it, could not recuse themselves for other reasons. Such as, like you say, appearances, or association.

Senator LEVIN. Should we write an appearance standard in any recusal language that we put in? Say there is the appearance of a beneficial relationship. Shouldn't that be enough?

Mr. MARTIN. I don't like it.

Senator LEVIN. You don't like the appearance?

Mr. MARTIN. Yes. I don't like making a recusal based only on appearance with this kind of statute. I do in other instances. I think what this statute is telling the Attorney General is you have a duty to act notwithstanding an institutional conflict and notwithstanding a personal and political conflict.

Senator LEVIN. Before this statute the Attorney General had a duty to act. There is nothing new about the duty. The duty always existed. The problem is there is an appearance problem out there, and a darn important one. That appearance problem came from the Attorney General being controlled by the people he is supposed to investigate and being cronies of the people he is supposed to investigate in many cases, and being responsible to the person who is the boss of the people he is supposed to be investigating. The public didn't have much confidence in that after Watergate. So we are trying to put in a whole new regime here to give some confidence back to the people in this democracy of ours, and part of that is based on the appearance of wrongdoing. You are saying you don't want to base recusal on the appearance; he's got a duty. He had a duty before Watergate.

Mr. MARTIN. But, Senator Levin, you have got a statute that wants to reach an objective. You want to have a person who undertakes a criminal investigation that is independent and separate in terms of supervision from the Attorney General. How do you get him there? Somebody who has that personal and political institutional conflict has to act.

Senator LEVIN. Not necessarily. Why can't you find someone who doesn't have a close political and personal relationship?

Mr. MARTIN. You can kick it down to the deputy, and that is fine.

Senator LEVIN. Of course. That is the whole issue. Why not?

Mr. MARTIN. It is not a problem for me.

Senator LEVIN. It is not a problem to kick it down to the deputy?

Mr. MARTIN. It is not, no.

Senator LEVIN. So that would be okay?

Mr. MARTIN. Sure that would be okay. That person will also have, in many instances, the political and personal conflict that the Attorney General might have.

Senator LEVIN. Then why not use a U.S. attorney?

Mr. MARTIN. You could find someone, I'm sure, who doesn't have the political——

Senator LEVIN. It wasn't hard with Deaver and Nofziger.

Mr. MARTIN. No.

Senator LEVIN. The Attorney General had a close personal relationship with Deaver and Nofziger, presumably. So he decided he was going to recuse himself. That wasn't complicated. You go down to the next person who doesn't have a close personal relationship, and they do it. It wasn't difficult. Why is that such a big stumbling block in your mind? It happens all the time. We have seen it with this Attorney General recusing himself.

Mr. MARTIN. Fine. If you want to put some standard into the Act that sets forth an appearance standard, that is fine. It seems to me that if you do that you are going to have most of the time the Attorney General recusing himself. People really have a sensitivity in this town about being accused of ethical improprieties, even appearances. If I were the Attorney General and you had a standard in there that said appearances, I would never make the decision. I would tell my deputy "you make all independent counsel decisions."

Senator LEVIN. Don't you have that standard right now? You have an appearance standard right now, don't you?

Mr. MARTIN. I am not so sure you do with this statute.

Senator LEVIN. I thought you said the Attorney General is bound by the current regulations.

Mr. MARTIN. He is. What I was trying to tell you is I am not so sure that based on the way the statute is written and based on the duty to act that I believe the Attorney General has under the statute that you can use the normal——

Senator LEVIN. Not "should"?

Mr. MARTIN. Not certain that he should use the normal objective standard for recusal, but he should use a more subjective standard.

Senator LEVIN. But he is now currently using that standard, is he not? Didn't you say he was bound now under current practice by these regulations of the Justice Department, which include an appearance standard, which include a close personal or political relationship? Hasn't he agreed that he is bound by that now? He did yesterday. At least his representative did.

Mr. MARTIN. I think he is.

Senator LEVIN. You don't think he should be?

Mr. MARTIN. I am not certain if you focus only on the independent counsel provisions that he is.

Senator LEVIN. Even that he is now?

Mr. MARTIN. Yes, I'm not certain.

Senator LEVIN. Even though he says that he is?

Mr. MARTIN. That's correct.

Senator LEVIN. You are not blurring what is and should be; you are saying even under existing practice of the Department of Justice you don't believe that he is bound by those regulations?

Mr. MARTIN. I am not certain that he is bound in making his decisions under the independent counsel provision. I am not certain.

Senator LEVIN. Back to the recusal issue. If the allegation against somebody is that that person offered a bribe to the Attorney General, should the Attorney General recuse himself?

Mr. MARTIN. I would think that is a beneficial relationship.

Senator LEVIN. No. There is no doubt that the Attorney General refused. As a matter of fact, the Attorney General is the one that filed the complaint. Should he recuse himself from deciding that issue?

Mr. MARTIN. The allegation is the Attorney General took a bribe?

Senator LEVIN. No. The allegation is the person in question offered a bribe to the Attorney General and it was refused. There is no beneficial relationship; there is no pecuniary relationship. Should the Attorney General recuse himself?

Mr. MARTIN. Do you mean because he is part of the actionable facts?

Senator LEVIN. Yes.

Mr. MARTIN. Yes. He probably ought to.

Senator LEVIN. But that is not in your standard.

Mr. MARTIN. No, it's not.

Senator LEVIN. So there could be enough connection with the facts that he ought to recuse himself?

Mr. MARTIN. There could be.

Senator LEVIN. Would you want to amend, then, your proposed standard?

Mr. MARTIN. I would be glad to work with the committee on working up some language that might expand it. I sure would be.

Senator LEVIN. On the Alexia Morrison matter, did she, the independent counsel in the EPA and Ted Olson case, seek the advice of your office relative to a possible conflict of interest in representing Carl Channell?

Mr. MARTIN. No.

Senator LEVIN. Have any Justice Department officials been in touch with your office about recusal issues concerning any of the independent counsel investigations?

Mr. MARTIN. No.

Senator LEVIN. I think that is it. Thank you. We may have some additional questions for the record. We will put your entire statement in the record. We appreciate your being here.

We finally get to our concluding panel. We appreciate their patience. Norman Lefstein, who is the chairman of the American Bar Association's Criminal Justice Section and professor of law at the University of North Carolina, and Thomas D. Morgan, who is the former dean and professor of law at Emory University. Professor Morgan is the author of a leading case book on legal ethics and has worked on a commission which designed new model rules on ethics for lawyers. Professor Lefstein is, as I indicated, chairman of the Criminal Justice Section of the American Bar Association and specializes in ethics at the University of North Carolina at Chapel Hill.

We welcome you both. We are grateful for your being here. We know the kind of inconvenience which you have put up with in order to be here, and indeed, while being here waiting for such a late appearance this afternoon. Thank you for coming.

TESTIMONY OF NORMAN LEFSTEIN, CHAIRMAN, AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION AND PROFESSOR OF LAW, UNIVERSITY OF NORTH CAROLINA;¹ AND THOMAS D. MORGAN, FORMER DEAN AND PROFESSOR OF LAW, EMORY UNIVERSITY²

Mr. LEFSTEIN. Thank you very much, Senator.

Both Professor Morgan and I appreciate the opportunity to be here to comment on the independent counsel statute.

I should like to say at the outset that although I have the privilege this year of chairing the Criminal Justice Section of the American Bar Association I am not here formally as a representative of either the section or the ABA. My comments are not those of neither the ABA or of the section.

Professor Morgan and I were asked to comment on a number of aspects of the independent counsel legislation. My statement has been submitted, and I will talk only very briefly about a couple of the highlights of my statement.

Senator LEVIN. Both of your statements will be incorporated in the record in full.

Mr. LEFSTEIN. Thank you.

One of the questions that was asked was whether or not there are regulations that govern the Attorney General's decision to recuse himself under the independent counsel legislation.

My own view was, in reading the regulations that have been promulgated pursuant to the statute and that appear in the Code of Federal Regulations, that it was by no means clear that they applied to the Attorney General. I noticed in Professor Morgan's statement this morning that he reached a contrary conclusion regarding the application of those standards in the Code of Federal Regulations. Mr. Martin also seemed to suggest, at one level at least, that he thought they applied.

*ERR11*I suppose the appropriate conclusion to come to is, and the one I would suggest is that it is by no means absolutely clear that those regulations reach the Attorney General, and I discuss in my statement some of the reasons why I have trouble concluding that, by their terms, they clearly apply to the Attorney General.

The more important question, I suggest, is what the standards should be as they pertain to recusal. In my judgment, I certainly think that where the Attorney General has either a personal or a financial interest or, indeed, for that matter, as your comments to Mr. Martin a few moments suggested, the appearance of a personal or financial conflict of interest, recusal would be altogether appropriate by the Attorney General during the preliminary investigation stage. By a personal conflict of interest, I am referring to a relationship with the person who is the subject of the investigation as well as to the facts of the case itself.

Senator LEVIN. May I interrupt just for a moment. Since I am here alone, I might as well ask a few questions as you proceed. Would you also apply that standard to stage 1, to a determination as to whether information is specific and from a credible source?

¹ See p. 286 for Mr. Lefstein's prepared statement.

² See p. 300 for Mr. Morgan's prepared statement.

Mr. LEFSTEIN. I would.

It seems to me that the more difficult question and the more important question is what do you do in the case where there does not appear to be either a personal or a financial conflict of interest but what might be termed a political conflict of interest. In my judgment, invariably the cases that arise under the independent counsel legislation involve what could properly be called a political conflict of interest, because the Attorney General's involvement in those cases creates, in the language of the Code of Federal Regulations where it uses the term "political conflict of interest," an appearance of a conflict "that is likely to affect the public perception of the integrity of the investigation."

Similarly, the standards of the American Bar Association, the Prosecution Function Standards, speak of the need when you are dealing with a public prosecutor to avoid "the appearance of a conflict of interest."

The independent counsel statute has essentially made a determination, a congressional determination, that there is an institutional conflict of interest when the Attorney General would actually prosecute a case that comes under the statute. That is, prosecute one of those persons who are listed in the statute. It seems to me, therefore, that the decision whether to ask for an independent counsel and the process of conducting a preliminary investigation similarly involves a conflict of interest for the Attorney General.

The problem, it seems to me, is what do you do about that. I say, of course, it is a conflict, because the Attorney General is traditionally a political appointee closely allied with the Administration that occupies the White House. What do you do about that kind of a situation?

My own view is that since Congress has established an independent counsel statute, that if it is going to operate in substantially the form that Congress intended, that probably the Attorney General should be permitted to continue conducting preliminary investigations even though technically there might be what we might regard as a political conflict of interest. Congress so far has said, in effect, that we can live with that conflict because it is only during a preliminary stage, and it is only for a 90-day period.

The problem most importantly arises when the Attorney General conducts the preliminary investigation, files a report with a panel of the court, and says no independent counsel ought to be requested. If he asks for an independent counsel, it seems to me that the kind of political conflict of interest that one might worry about up until that point becomes largely academic. It is really the situation where he says no independent counsel is necessary.

In that situation, there are a variety of alternatives that have been suggested. The one that I suggested in my statement—and I may be all alone in making the suggestion—I haven't found anyone who has joined with me, although there may be others—is that there ought to be an independent review undertaken of the Attorney General's decision.

I said in my statement that what we ought to have is someone who might be called, for lack of a better term, a "special examiner," that is, someone who would take the report of the Attorney General and the investigative record compiled by the Department

of Justice, someone who would be independent of the Department, whose impartiality would be unquestioned, and who would decide whether it makes sense for the case to be closed. If that individual, or individuals, concluded that the decision by the Attorney General made sense, that would be the end of the matter.

If, on the other hand, there was disagreement with the conclusion reached by the Attorney General and the Department of Justice, then I would suggest the division of the court would automatically be required to appoint an independent counsel.

The advantage of this proposal is that it keeps in tact the current discretion that is available to the Attorney General and the Department of Justice. It means that the Attorney General does not ask for an independent counsel except in those cases where he really thinks it is important to do so, and if he doesn't think it is important to do so, he will not; and at the same time there will be some independent review of the decision not to ask for an independent counsel.

There are other aspects of my statement that deal with issues of recusal, but I think that what I have touched upon is perhaps the most important and the heart of the matter.

Senator LEVIN. Before we turn to you, Professor Morgan, let me just ask a few questions of Professor Lefstein.

How would you distinguish between personal and political conflicts of interest? You would cover the personal, as I understand it, and the appearance thereof, but you would not necessarily cover the political unless there was a finding not to proceed to an independent counsel stage, at which point you would have some kind of a check.

Mr. LEFSTEIN. That is correct.

Senator LEVIN. Can you define those "personal" and "political" terms?

Mr. LEFSTEIN. Personal, it seems to me, deals with whether or not the Attorney General has a relationship with a person who is under investigation. As your comments before indicated, we assume that the Attorney General in the Deaver case disqualified himself because of a relationship with the subject of that investigation. Similarly, as your comments before suggested, if there is a relationship to the subject matter of the investigation, I should think that that would be a clear instance of a personal conflict of interest and the Attorney General should disqualify himself.

Senator LEVIN. Does that include friendship?

Mr. LEFSTEIN. Surely. Friendship may constitute a personal relationship.

What I am referring to as a political conflict of interest is what, it seems to me, the independent counsel statute is all about. It is all of those other cases out there where the impartiality of the Attorney General is likely to be questioned if a decision is made not to ask for an independent counsel.

Senator LEVIN. In the Nofziger and Deaver cases, from what you know, was the Attorney General right in disqualifying himself?

Mr. LEFSTEIN. The problem is I don't know. I assume that he disqualified himself for personal reasons, and I would certainly have no basis for disagreeing that that was a perfectly appropriate judgment on his part.

Senator LEVIN. There were no written decisions to analyze in those cases. Do you think that where we do have these issues come up that there ought to be a requirement for written decisions on recusal?

Mr. LEFSTEIN. Yes. I think it would be helpful.

Senator LEVIN. I will have some other questions for you, but let me now turn to Professor Morgan.

Mr. MORGAN. Thank you, Mr. Chairman. I am also very honored to be asked by the subcommittee to attend this hearing this morning.

I start with two assumptions and beliefs in this area. The first is that the independent counsel legislation is basically well conceived and by now an accepted part of the process. It gives the public confidence that national leaders are not above the law and it allows the business of government to continue in the face of potential scandal because the public is confident that the independent counsel is going to get to the bottom of things and bring the facts out.

My second assumption and belief is that recusal and disqualification for conflict of interest are not insulting to or a moral judgment on a responsible lawyer. The private practice of law presents countless situations in which a lawyer has to be sensitive to potential conflicts, not because the lawyer is dishonest or is going to do something dishonest, but because appearances count. I think all lawyers recognize that. The honorable lawyer bends over backwards to respect rules designed to protect the public against the possibility that less honorable lawyers might do wrong. So nothing that I say here and no plan that I propose is meant to imply any lack of confidence in the actual integrity of particular Attorneys General, past, present or future.

As the committee recognizes, the independent counsel process involves three steps, depending a little on how you count.

The first is investigation of the initial charge.

Second is the appointment of the independent counsel.

Third is the independent counsel's investigation and possible prosecutions.

The second of these is handled by a three-judge court. The third is, by definition, independent. That is the independent counsel. Only the first step is given to the Attorney General.

The recusal standards for Justice Department officials are established both by statute and by regulations. I don't think there is much serious question that the Attorney General is meant to be covered by those regulations and statutes, although I agree with Professor Lefstein that the method of application is very awkward and confusing today.

Recusal is required in the case of personal, financial or political conflicts of interest. I think everybody has agreed that a financial conflict is a basis for disqualification. Personal has been conceded by both Attorney General Smith and, I gather, Attorney General Meese, based on his actions in the Deaver and Nofziger cases. So I don't think that those are seriously controversial issues today.

As others have commented, it is the area of political conflicts where the issues arise. One view is certainly that all of these cases are inherently political and thus recusal for political conflict is

never appropriate. I think you can read the present statute to basically lead to that conclusion.

But I respectfully suggest another approach in my prepared statement, which has been submitted for the record. I suggest that—because political conflicts are as inherent at the initial investigation stage as they are at the time of the subsequent prosecution of somebody that is being proceeded against—the independent counsel statute ought to remove the Attorney General from the early stages of the process just as it does from the later stages.

My suggestions in that statement have tried to be sensitive to the legitimate constitutional concerns about separation of powers by suggesting that the responsibility be assigned to existing Justice Department officials. I suggest, for example, the Deputy Attorney General, the Assistant Attorney General, Criminal Division, or the U.S. Attorney for the District of Columbia. Their independence might be questioned in particular cases, but they would not, I suggest, have that kind of inherent political conflict that would seem to reside in the Attorney General.

Many people who have testified up to now, including Professor Lefstein, have basically, it seems to me, assumed that there has been a final judgment that the Attorney General ought to have this responsibility. While I certainly don't claim to be a complete historian of this statute, my reading of the hearings and the prior proceedings suggest to me that essentially this was not perceived to be a problem in the past. One of the benefits of this reauthorization process is to see where the statute may not work as well as it might and perhaps to suggest that at least once you get beyond that very preliminary screening stage of the rumor that comes across the transom, the matter should simply routinely be referred to someone in the Justice Department other than the Attorney General.

I suggest that this time of reauthorization is the ideal time to at least reconsider the assignment of that responsibility, and that to do so would remove the appearance of conflict of interest from that initial stage just as the statute properly has at the later stage.

Senator LEVIN. Thank you, Professor Morgan.

Would you give us a definition of "personal" versus "political" conflict of interest and tell us how you would differentiate? I am not sure it is nearly as significant in your approach as it is in Professor Lefstein's, because he would take political right out of the recusal statute and you would leave it in. But try anyway, if you would. Two members of the cabinet: is that personal, political, or both?

Mr. MORGAN. I think that there is a problem trying to distinguish the two. The two are distinguished in the Justice Department regulations, as I recall. There is an attempt made to distinguish those long-term, presumably friendship type relationships from relationships that not necessarily were formed in Washington but relate principally to the officials' mutual loyalty to the President and the President's programs.

Senator LEVIN. What about business or professional relationships?

Mr. MORGAN. Professional relationships here in Washington would be political, but professional relationships such as being

former law partners or being former business partners would be personal or financial.

Senator LEVIN. Let me press this a bit, because if we are going to make any kind of distinction here we have to try to figure out a definition.

Let's assume you have got two cabinet officers, the Attorney General and someone else, and now the allegation is against that other cabinet officer. Would you, Professor Lefstein, put that in the personal or political category or both? Or say it depends? Or what?

Mr. LEFSTEIN. I think it is certainly political. Whether it is personal I think would depend upon any additional facts that might be available. If there has been no relationship between the parties involved, that is, the Attorney General had not served in the White House or worked closely with the cabinet officers except that he is also a member of the cabinet, I would say that that is not necessarily personal.

Senator LEVIN. What about a former deputy of the Attorney General but there is no evidence of anything other than that connection?

Mr. LEFSTEIN. And they have worked together?

Senator LEVIN. Yes, but only 9 to 6. Nothing after hours; nothing with spouses or that kind of that thing.

Mr. LEFSTEIN. I think that is arguably personal. The regulations promulgated by the Attorney General speak of allowing a fair measure of discretion in the individual who would recuse himself. The nature of the beast is such, it seems to me, you can't be absolutely specific in all of these cases, but I certainly could see an argument that that is a case where personal disqualification should require recusal of the Attorney General. The problem is, as I said in my opening remarks, if he doesn't recuse himself and decides not to ask for an independent counsel, then there is a problem in terms of public confidence.

Senator LEVIN. In case of doubt as to whether or not an Attorney General should recuse himself would you advise him to recuse himself?

Mr. LEFSTEIN. Personally I would, yes.

Senator LEVIN. Professor Morgan?

Mr. MORGAN. I think he should, yes.

Senator LEVIN. As I understand your position, you wouldn't have the Attorney General doing this at all.

Mr. MORGAN. My position, Mr. Chairman, would be that the responsibility ought to be assigned to someone else in the Justice Department.

Senator LEVIN. Let me then address the questions in this regard to Professor Lefstein.

The Justice Department stated yesterday that the decision not to recuse oneself as Attorney General is more courageous, to use their term, than the decision to recuse. Would you agree with that?

Mr. LEFSTEIN. I am not quite certain I know exactly what the import of that statement is. I don't know that I have an opinion on it.

Senator LEVIN. I want to ask you a question or two about independent counsel.

First, Professor Lefstein, regarding the case of Alexia Morrison, the EPA independent counsel who is also serving as a defense counsel to a target of the Iran-contra independent counsel, Mr. Walsh. You mentioned there might be a risk in that information learned while serving as an independent counsel might be helpful in the case that the lawyer is defending. I think you mention that in your statement. But in any event, I might add an additional factor for this question. In the EPA case, as I understand it, an attorney named Sullivan is representing Mr. Schmults. Independent Counsel Morrison has asked the special court for expanded jurisdiction so as to include Mr. Schmults. In the Iran matter Mr. Sullivan represents North, who has challenged the constitutionality of the independent counsel statute in court. Meanwhile, Ms. Morrison is representing Mr. Channell, who is reportedly under investigation by the Iran-contra independent counsel, Mr. Walsh.

I think you are familiar with that situation even though it may be impossible to follow my question. Do you see any conflicts arising from that situation?

Mr. LEFSTEIN. I confess to you I don't have a chart up here and I don't have all of that straight in my head. I think that it would be advisable for persons who are serving as independent counsel, even if they qualify as special government employees, that they not simultaneously be involved in serving as defense counsel for targets of other separate independent counsel investigations.

Senator LEVIN. Is that an appearance issue, or is that a reality issue?

Mr. LEFSTEIN. I don't think there is an issue in most of these cases of confidential information that might be exploited. I think it may be an issue of divided loyalties. I gave one example in my statement about a circumstance possibly arising where as defense counsel you might want to challenge some aspect of the independent counsel legislation, whereas as an independent counsel you presumably don't want it raised, at least not in the case in which you are involved; theoretically, as independent counsel and as defense counsel for a target, you could be on both sides of the same legal question. It seems to me that that is the kind of conflict that ought to be avoided.

Senator LEVIN. We do have situations in a number of small towns where you have got one lawyer on both sides of exactly the same issue in court. In fact, some of us have argued both sides of an issue in court. Do you see a conflict in that, automatically?

Mr. LEFSTEIN. This is an issue as it is applied in other situations on which legal ethics commentators have sometimes differed. You might on one day take one legal position and six months later take a different legal position on behalf of another client. I am not sure that many would complain about that from an ethical standpoint. The problem becomes more acute if it happens simultaneously in two different cases before two different judges; even more acute if it happens simultaneously before the same judge. That is the kind of situation that we are talking about here, and you are talking about it in an area of enormous sensitivity to begin with, and it seems to me advisable that it ought not to be permitted.

Senator LEVIN. We are not quite talking about that situation here, because as I understand it, the special counsel here has dis-

closed to her private client the situation and will not make an argument in court against the constitutionality.

Mr. LEFSTEIN. When I was talking about that situation here, I was speaking hypothetically, that something could arise.

Senator LEVIN. Let's go to a hypothetical. Let's take the case where the counsel disclosed to the private client that she or he will not argue the same issue in court which she is arguing in the independent counsel matter. There is full disclosure, there is a refusal to argue the issue, and the person says I want you anyway. Does that affect your judgment?

Mr. LEFSTEIN. I think that is a much tougher case. One could make an argument that it ought to be permitted, but I take it the task of the Congress is to figure out if you are going to address this issue at all what ought to be the rules in this area. It seems to me that the easiest rule might be a black letter one affecting relatively few people and relatively few cases where you simply avoid the possibility of a problem arising.

Senator LEVIN. There is no doubt it is easier that way.

I think, Professor Morgan, your testimony is that a person who is acting as an independent counsel in one prosecution should not act as counsel for a defendant in another case filed by an independent counsel, and you would make that a flat out rule, as I understand it.

Mr. MORGAN. I think Professor Lefstein and I have exactly the same position, as I have understood him on the matter, that it should not be done. There is precedent, at least in state court proceedings, where you have people who sometimes are part-time prosecutors and have a practice on the side, that suggests that that is unethical. What I am suggesting is that the same principles, the kinds of things that underlie that standard in those state proceedings, are appropriate to use by analogy in this situation.

Senator LEVIN. Don't we also have part-time prosecutors who are allowed to practice on the side?

Mr. MORGAN. Oh, yes. They are allowed to practice, but they just aren't allowed to take criminal cases, at least under the cases that I cited. I won't say that there may not be some situation where they are. My understanding of at least the general principle is that it is thought to be improper for them to do so.

Senator LEVIN. To handle a criminal case in the same circuit?

Mr. MORGAN. They clearly can't handle a criminal case that arises under the authority of the office for which they are acting as a prosecutor, but these cases essentially hold that you can't do it in the next county as well, as I understand them.

Senator LEVIN. Is that an accepted ethical principle, that a part-time prosecutor in one county cannot defend a criminal case in another county?

Mr. LEFSTEIN. I believe that is right, although I should tell you that I use Professor Morgan's book when I teach in this area. I am certainly prepared to yield to him on that issue.

Mr. MORGAN. Mr. Chairman, I have cited a couple of cases in the footnotes. I can brief that further if you wish.

Senator LEVIN. That's okay. I have been pressing my staff on this issue, telling them I don't think there is any ethical problem with

that at all. As usual, I am learning from law professors today for free.

Professor Morgan, in the situation which we have described, with that specific counsel, Alexia Morrison, do you have an opinion that that constitutes a conflict, what is happening there? You are familiar with the facts. Is there a conflict there, in your opinion, and should she act to correct it?

Mr. MORGAN. As I understand it, Mr. Chairman—and I may have misread some of the materials that were supplied by your staff—there are court orders, as I read them, that say that each office of independent counsel, each case, is a separate agency. If they are in fact separate agencies of government and have no relation to each other or to the Justice Department, perhaps the answer in this specific case would be influenced by those court orders. My own view is that if those court orders are a fair interpretation of the present law, the law ought to be changed to make it improper for an independent counsel to do it. I think it would be inappropriate for me to try to make a flat statement on what Ms. Morrison is in fact doing, however.

Senator LEVIN. Assume the following facts are true about the Iran-contra matter. Attorney General Meese provided legal advice related to the presidential finding authorizing the arms sale to Iran. In 1984, assume that he had frequent contacts with Colonel North after the President had ordered the creation of a private network to supply the contras, and that he has acknowledged that he briefly halted an ongoing FBI investigation of Southern Air Transport. Under these circumstances should Meese have recused himself from this case?

Mr. MORGAN. I think, as one of the previous speakers has said, that when he decides to go ahead with the independent prosecutor situation it almost becomes a moot point. In this case I suspect it was so obvious that the matter was going to go that far that it almost must have been a minor issue in the Attorney General's office as to whether he should have recused himself. As a general proposition in that kind of situation, however, my view is that he should not have participated in the decision.

Senator LEVIN. Professor Lefstein.

Mr. LEFSTEIN. I would not disagree with the conclusion. Certainly it is arguable on the facts as you cited them that there was what I would call a personal conflict of interest, leaving aside the political nature of it all. Personal because he was involved, arguably, according to your facts, with the facts that were under investigation.

Senator LEVIN. In another matter, there is a little longer assumption, but here goes. We probably should have given you copies of these, but I will try to read it clearly and slowly.

We will start with you this time, Professor Morgan.

Assume the following facts. Mr. Meese and Mr. Schmults were college friends and have now known each other for more than 20 years since then. Mr. Schmults served as the deputy Attorney General in the Justice Department, the number two person, in other words, at Justice, at the same time that Mr. Meese was at the White House serving as Counselor to the President. In fact, while Mr. Meese was at the White House he attended a meeting, at least one, in which Mr. Schmults and others were also present to discuss

the congressional inquiry into EPA, including a request for documents. Later, assume that Mr. Meese becomes Attorney General and Mr. Schmuts returns to private practice. Then a congressional committee submits a 1,300-page report to Attorney General Meese claiming that a number of former officials at Justice and EPA had obstructed their inquiry and the committee asks for an independent counsel.

I know that you don't think Meese should be doing this anyway, but apart from that position, under existing practice and law should Meese recuse himself from the independent counsel process, at least as it relates to Schmuts?

Mr. MORGAN. Yes, Mr. Chairman. I think one fairly bright line rule you can apply in these situations is that anytime the Attorney General himself has participated in any of the events that are part of the substance of the issues being investigated that the Attorney General ought to recuse himself. Whether you call that personal or political, it is easily one or the other.

Senator LEVIN. I am going to correct my assumption. Apparently Meese and Schmuts were not necessarily friends in college. They knew each other in college and went there together. I don't think that affects your answer, because it was the nature of the common meeting.

Mr. LEFSTEIN. I don't disagree with Professor Morgan's statements on that issue. I would agree with him.

Senator LEVIN. You both have been very helpful. We will possibly have some questions for the record for you. If so, we will forward them to you and hope perhaps you can give us some more advice. We thank both of you for the effort which you made to be with us this morning. We know what that was and are very much in your debt for doing that. More important, hopefully the law will be written, rewritten, or reauthorized in a way which you can see is something that you are proud of.

Thank you for coming.

Mr. MORGAN. Thank you, Mr. Chairman.

Mr. LEFSTEIN. Thank you, Senator.

Senator LEVIN. The hearing is adjourned.

[Whereupon at 12:55 p.m. the hearing was adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD



Department of Justice

STATEMENT
OF
JOHN R. BOLTON
ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS
BEFORE
THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
CONCERNING
THE INDEPENDENT COUNSEL STATUTE
ON
MARCH 19, 1987
(109)

Mr. Chairman and Members of the Subcommittee:

On behalf of the Department of Justice, I am pleased to have this opportunity to provide our views on the proposed re-authorization of the independent counsel provisions of the Ethics in Government Act of 1978.

I wish to stress at the very outset of this testimony that this Administration, and specifically the Department of Justice, is completely committed to working with Congress to develop a responsible, constitutional mechanism to ensure vigorous enforcement of the law against any and all government officials who dishonor themselves, their President and their country by breaking the law. We are dedicated to the highest standards of ethical propriety and public integrity, and to the avoidance of any political interference, from any source, in the investigation of possible criminal behavior.

We are now over a decade away from the events which gave rise to the passage of the Act. This distance in time provides an opportunity for a dispassionate review of the independent counsel provisions so that, as Mr. Justice Jackson once observed, we can avoid the "tendency. . . to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic." Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring).

For the past fourteen years, this Department has had an opportunity to testify on a number of occasions on the independent counsel statute and the various legislative proposals

that led up to its enactment in 1978. With a single exception, on every such occasion our testimony has included questions concerning the constitutionality of legislation that would remove the function of prosecuting crimes from the Executive and lodge it in an individual who is neither appointed by nor removable by the President or the Attorney General. In 1973, Acting Attorney General Bork, testifying before the House Judiciary Committee, objected to a bill that would have provided for judicial appointment and removal of a special prosecutor. He argued that the prosecution of crimes is an executive function which cannot be controlled by the judiciary. In 1974 and 1975, Department of Justice officials testified before the Senate Judiciary Committee on a variety of bills to create a permanent prosecutorial office that would operate independent of the President's supervision and control, concluding in each case that under our system of government the prosecution of crimes is a core executive function which cannot be removed from the control of the Executive.

In 1976, Attorney General Levi raised constitutional objections before the Subcommittee on Criminal Justice of the House Judiciary Committee to provisions in a bill quite similar to the legislation finally enacted in 1978. Testifying before a Senate committee on another piece of legislation that same year, Deputy Attorney General Tyler also objected to the limitations placed on the Attorney General's power to remove a court-appointed special prosecutor.

After enactment of the present statute, Attorney General Smith in 1981 informed the Senate Legal Counsel of the grave doubts the Department still entertained over the statute's constitutionality, noting in particular the questionable mechanisms for appointment and removal of the special prosecutor. The Attorney General argued that federal prosecutors "must be accountable to the President or the Attorney General." And during the last round of reauthorization hearings, the Associate Attorney General urged repeal or modification of the special prosecutor provisions on grounds that they improperly insulate the exercise of an executive function from the control of the President.

The testimony I intend to give here follows this long line of Department of Justice precedents. We agree with such distinguished former departmental officials as Acting Attorney General Bork and Deputy Attorney General Tyler, both of whom have served as respected federal judges, that the Constitution does not permit legislative or judicial intrusion into the executive function of criminal prosecution.

I. CONSTITUTIONALITY OF THE STATUTE

This Administration, like other Administrations over more than a decade, believes that there are grave constitutional problems with statutes like the present independent counsel statute insofar as they seek to compromise full legal control by the executive over what, under our Constitution, is the core Executive branch function of investigating and prosecuting crime in the name of the United States. We, like prior Administrations, raise these concerns notwithstanding the need to assure the complete integrity, the appearance of complete integrity, and the absence of any semblance of conflict of interest in the investigation and prosecution of violations of law by high officials of the Executive branch. While we completely agree with these goals, we believe the integrity of our constitutional system of separation of powers is a goal of at least equal importance. The proliferation of special arrangements outside of the three branches of government to meet special, and at the time apparently urgent, needs threatens the coherence of our governmental structure and the ultimate source of integrity: political responsibility.

Having stated these principles and the reasons for our objections, we must of course seek ways to meet the concerns which have given rise to this and similar legislation. We do not think that our constitutional scheme is so-ill conceived and infertile that it cannot fully address the concerns of public integrity without also keeping intact its deepest structural

imperatives. Accordingly, at the conclusion of these remarks, we will raise a number of considerations which we believe are directly relevant to the drafting of an independent counsel statute. Such a statute must meet the needs of public integrity in a manner which does not sacrifice the separation of powers. Before discussing the general nature of a constitutionally sound statute, however, we wish to highlight our constitutional concerns. These relate to the role of the President in directing criminal prosecutions and whether any part of that role can be assigned to a court.

A. Executive control of criminal prosecution.

1. The Independent Counsel as an executive officer.

Our concerns with the independent counsel provisions of the Ethics in Government Act of 1978 are derived from the constitutional doctrine of separation of powers, a doctrine integral to our system of government. Article II of the United States Constitution states that the "executive Power shall be vested in a President of the United States" and that the President "shall take Care that the Laws be faithfully executed." Moreover, the Supreme Court has unambiguously declared that the federal law enforcement constitutes a quintessentially and exclusively executive function. Indeed, the case law on this point could not be any clearer. In Buckley v. Valeo, 424 U.S. 1 (1976), for example, the Supreme Court rejected the argument that the Federal Election Commission, which possessed authority to bring civil lawsuits to enforce the federal election laws, could

be considered a legislative body. On this matter, the Court held:

A lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

Id. at 138 (citing U.S. Const. art. II, sec. 3). The Buckley Court's conclusion echoed Justice Sutherland's opinion for the Court in Springer v. Phillipine Islands, 277 U.S. 189 (1928). Springer construed the Organic Act for the Phillipine Islands, then a United States territory for which the system of government had been modeled on the separation-of-powers principles contained in the United States Constitution. In striking down a local law that gave the Phillipine legislature control over certain executive officers, the Court declared that the authority to enforce laws was an "executive function." Id. at 202.

What the Court has acknowledged with respect to prosecution of civil enforcement actions must hold a fortiori with respect to criminal prosecution. Indeed, in the recent case of Heckler v. Chaney, 470 U.S. 821, 832 (1985), the Supreme Court declared that "the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" This conclusion, derived from the text of Article II, section 3 of the Constitution, is by no means an isolated statement or a loose dictum in the Supreme Court's

jurisprudence. Indeed, the Court's cases addressing the constitutional nature of criminal prosecution have gone even further than the modest assertion announced in Heckler. In United States v. Nixon, 418 U.S. 683 (1974), for example, the Court declared not merely that criminal prosecution amounted to the "special province" of the Executive; rather, it acknowledged that "the Executive has exclusive authority and absolute discretion to decide whether to prosecute a case." Id. at 693 (emphasis added). ¹ See also United States v. Batchelder, 442 U.S. 114, 123-24 (1979). For the foregoing reasons, we believe

¹ The authorities cited by the Nixon Court in support of this statement are Confiscation Cases, 7 Wall. (74 U.S.) 454 (1869), holding that the Attorney General had discretion to dismiss libels for the criminal condemnation of certain vessels ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney."); and United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965), in which the Fifth Circuit held that the district court had no authority to use its contempt power to compel the United States Attorney to initiate a prosecution. See also, Smith v. United States, 375 F.2d 243, 246-47 (5th Cir.), cert. denied, 389 U.S. 841 (1967) ("The discretion of the Attorney General in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started, is absolute . . ."). In Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967), Judge (later Chief Justice) Burger remarked that

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.

See also, In re Grand Jury, January, 1962, 315 F.Supp. 662 (D.Md. 1970); United States v. Greater Blouse, Shirt and Neckwear Contractors Ass'n Inc., 228 F.Supp. 483, 489 (S.D.N.Y. 1964).

the independent counsel must be considered an executive officer.²

2. Presidential control of executive officers.

Under the constitutional system of separation of powers the President, or his delegate, must retain the unfettered ability to direct and supervise all executive officials. Accordingly, no congressional restriction on the removability of officials in the executive branch may assume a form that would interfere with the President's supervision of the unitary executive. Although the Constitution clearly contemplates that subordinate executive offices will be created by statute, the Constitution itself creates no such offices, and it does not require the creation or the continuation of any such office. Accordingly, subordinate executive officers created by statute derive all their constitutional power from that afforded the President. The executive power exercised by all such officers flows from the President's power, to be performed in strict conformity with his direction. "If the execution of the laws is lodged by the Constitution in the President, that execution may not be divided upon into segments, some of which courts may control and some of which the President's delegate may control. It is all the law enforcement power and it all belongs to the Executive." Nathan v. Smith, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J. concurring).

²This constitutional exclusivity of the Executive's control over criminal prosecutions has the necessary corollary that the other branches have no part in the prosecutorial decisionmaking process. The courts have long recognized and respected this limitation on their own power, see part I. B. 2., *infra*.

The nature of this presidential monopoly on the executive power has received clear recognition in the Supreme Court. While the Constitution nowhere mentions a presidential power to remove executive officials, the Supreme Court has concluded that the power to remove is an essential component of the architecture of presidential control over the execution of the laws. The seminal case of Myers v. United States, 272 U.S. 52 (1926), established this proposition beyond peradventure in striking down a federal statute that conditioned the removal of certain postmasters upon the advice and consent of the Senate. Chief Justice Taft's 125-page opinion for the Court exhaustively considered the question of the sources of power to remove executive officials. The Chief Justice concluded that the power to remove should be viewed as an incident to the power to appoint,³ and he gave extensive consideration to the historical evidence of the view on the removal power that prevailed in the period immediately following the framing of our Constitution, tracing in depth the so-called "decision of 1789."⁴ The Court in Myers, however, ultimately

³See In re Mennen, 38 U.S. (13 Pet.) 230 (1839) ("[i]n the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."). See also, e.g., Shurtleff v. United States, 189 U.S. 311, 361 (1903); Reagan v. United States, 182 U.S. 419, 426-27 (1901); Blake v. United States, 103 U.S. 227, 231 (1880).

⁴The "decision of 1789" refers to the First Congress' decision, after consideration, not to give the President express statutory power to remove the Secretary of Foreign Affairs. It was deemed unnecessary to give the President this power because he had the inherent power to take the action in question. See Myers v. United States, 272 U.S. 52, 113-15 (1926). See also,
(continued...)

placed principal reliance on a necessary implication from the text of the Constitution, specifically, Article II's command that the "executive Power shall be vested in a President of the United States of America" and that this President "shall take Care that the Laws be faithfully executed."⁵ On this point, the Court

⁴(...continued)

e.g., Parsons v. United States, 167 U.S. 324, 328-30 (1898); In re Hennen, 38 U.S. (13 Pet.) 230, 237-38 (1839).

⁵The independent textual basis that Article II provides for presidential removal power in no way conflicts with or depends upon the historical judgment made by the Court in Myers respecting the "decision of 1789," or the theory, relied upon in Hennen, that the power to remove is incident to the power to appoint. Hennen simply establishes a rebuttable presumption of coterminous powers of appointment and removal, and the "constitutional provision" of Article II overcomes that presumption where necessary to allow the President to take care that his subordinates faithfully execute the laws. Myers was not the first case in which the Supreme Court had relied on the theory that Article II gives the President the power to remove executive officers. In Shurtleff v. United States, 189 U.S. 311 (1903), the Supreme Court narrowly construed a statute establishing a board of general appraisers and enumerating the causes for which the President could remove a general appraiser. In upholding dismissal of an appraiser for reasons presumed not to be among those listed in the statute, the Court refused to construe the list of enumerated causes as exclusive, notwithstanding the well-established maxim of statutory construction, expressio unius est exclusio alterius. In explaining the rejection of this venerable rule of construction, Justice Peckham stated:

In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws be faithfully executed, and we think it would be a mistaken view to hold that mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sensible.

(continued...)

held:

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

Id. at 117. The court reiterated this principle in the concluding paragraphs of its voluminous decision:

Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government -- i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers -- a conclusion confirmed by his obligation to take care that the laws be faithfully executed.

Id. at 163-64 (emphasis added). Thus, *Myers* instructs that, although there may be other sources of removal power, the President enjoys such power with respect to executive officers, at a minimum, to the extent necessary to superintend the executive branch in its execution of the laws.

As an historical matter, the remarks of James Madison during

⁵(...continued)

Id. at 317.

the debate over the "decision of 1789" corroborate Chief Justice Taft's analysis in Myers. In the debate in the First Congress over the establishment of a Department of Foreign Affairs, Madison discussed the relationship of presidential removal power and the duty to take care that the laws be faithfully executed. Responding to the contention that removal of civil officers could be effectuated solely by means of impeachment, Madison declared:

I agree that if nothing more was said in the Constitution than the President, by and with the consent of the Senate, should appoint to office, there would be great force in saying that the power of removal resulted by a natural implication from the power of appointing. But there is another part of the Constitution, no less explicit . . . which declares that the Executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly. But there is another part of the Constitution, which inclines in my judgment, to favor the construction I put upon it; the President is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hand of the Executive Magistrate, it would seem that it was generally intended that he have that species of power which is necessary to accomplish that end.

1 Cong. Deb. 495 (J. Gales ed. 1834) (remarks of James Madison).

The "species of power" to which Madison referred was the sole prerogative of removal, for he later added:

If the President should alone possess the power of removal from office, those who are employed in the execution of the law will be in their proper situation and the chain of dependence be preserved; the lowest offices, the middle grade, and the highest, will

depend, as they ought, on the President, and the President on the community.

Id. at 499. These remarks, uttered by one of the most influential of the Framers of our Constitution, merit considerable weight.

Returning to the case law, a decade after Myers, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Court held that the President's removal power did not apply to the Federal Trade Commissioners because their duties included quasi-judicial and quasi-legislative functions. Significantly, however, the Court did not question Myers' continued validity with respect to officers performing "purely executive" functions. 295 U.S. at 631-32. The Supreme Court reached a similar conclusion in Weiner v. United States, 357 U.S. 349 (1958) (President lacks plenary removal authority over members of War Crimes Commission). Since it cannot be disputed that an independent counsel performs functions that are purely and quintessentially executive, Humphrey's Executor and Weiner have no application here.⁶ Indeed, just last Term in Bowsher v.

⁶ Similarly, historical examples of early congressional proposals or measures to confer statutory independence on certain federal officers do not detract from the position we advance. That James Madison in 1789 argued against the Comptroller of the Treasury's holding his office "at the pleasure of the Executive Branch" does not negate the conclusion that Article II, requires that the President be able to remove federal officials performing executive functions. With respect to the Comptroller, Madison stated:

It will be necessary to consider the nature
(continued...)

Synar, 106 S. Ct. 3181 (1986), the Supreme Court powerfully reaffirmed that the authority to remove an officer constitutes an essential component of the power to direct and control that officer. Id. at 3188. Relying on Myers, the Court struck down a statute vesting executive authority in the Comptroller General on the ground that he could be removed only by a joint congressional resolution or by impeachment. Bowsher, therefore, is a clear recapitulation of the longstanding principle that the President must have exclusive authority to remove those charged with executing the laws on his behalf.

Any statutory restriction on presidential removal of a federal prosecutor like the independent counsel, must yield to the explicit constitutional responsibility of the President to direct the prosecutor's execution of the laws. This conclusion, moreover, does not depend on whether the independent counsel is a "superior officer" or an "inferior officer" under the Constitution.⁷ While the Supreme Court in dictum has stated that

6(...continued)
of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not of a purely Executive nature. It seems to me that they partake of a judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree.

1 Cong. Deb. 611-12 (1834) (remarks of James Madison). Moreover, in the end, Congress did not enact Madison's proposal to insulate the Comptroller. Id. at 615.

⁷As independent counsels appointed under the Ethics in Government Act are not, on the face of the statute, subject to
(continued...)

Congress' power to vest appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments" carries with it the power to restrict the terms of removal of those inferior officers, Myers v. United States, 272 U.S. 52, 160 (1926); United States v. Perkins, 116 U.S. 483, 485 (1886), this principle must be understood as being sharply circumscribed by the President's explicit constitutional prerogative and obligation to exercise the executive power. As Chief Justice Taft's opinion for the Supreme Court in Myers v. United States, 272 U.S. 52, 132-33 (1926), illustrates, and as the Court reiterated just last Term in Bowsher v. Synar, 106 S. Ct. 3181, 3188 (1986), the power to remove an executive officer is essential to the power to direct the execution of the laws.

B. Limitation on the Role of the Courts.

1. Court appointment of the independent counsel.

A serious constitutional question is raised by the provision of judicial appointment of an independent counsel. By vesting in a court of law the power to appoint an inferior officer

⁷(...continued)

the direction and control of any other officer in the performance of their duties, it is at least arguable that they are not inferior officers, in that the use of the term "inferior" necessarily implies the notion of being subordinate to a superior. However, because the Act does not require Presidential appointment with Senate confirmation, independent counsels cannot validly be superior officers, regardless of their duties or independence. Assuming, as Congress apparently intended, that the independent counsels are inferior officers, H.R. Rep. No. 1307, 95th Cong., 2d Sess. 5 (1976); S. Rep. No. 823, 94th Cong., 2d Sess. 24 (1976), nothing in the case law or the Constitution suggests that Congress can limit the President's constitutional law-enforcement power by assigning an aspect of that power to an inferior officer whose removal is statutorily limited.

performing the core executive function of criminal prosecution, Congress appears to have transgressed limitations implicit in the Appointments Clause, which states in relevant part that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, sec. 2, cl. 2. This clause was added late in the drafting of the Constitution, and was the subject of very little debate. It seems clear, however, that this language from the Appointments Clause was intended merely to vest the appointment of inferior officers in the branches of government to which they belong. James Madison clearly understood that this clause could not be intended to overturn the carefully crafted structure of the separation of powers. In The Federalist, Number 51, Madison wrote that each branch of the government (which he referred to as "departments")

should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.

During the First Congress, Madison said, "I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing and controlling those who execute the laws." 1 Annals of Congress 481 (1789). Jefferson was of the same mind, as he stated in a letter: "Nomination to office is an executive function By leaving nomination in its proper place among executive functions the principle of the distribution

of powers and responsibility weighs with its heaviest force upon a single head." Quoted in Field v. People, 3 Ill. 79, 141 (1839).

Indeed, in the mid-nineteenth century, the Supreme Court stated: "The appointing power here designated, in the latter part of the section [Article II, section 2], was, no doubt, intended to be exercised by the department of the government to which the officer to be appointed properly belonged." Ex parte Hennen, 38 U.S. (13 Pet.) 230, 257-58 (1839). In a later case, Ex parte Siebold, 100 U.S. 371 (1879), the Court construed an exception to permit federal courts to appoint federal election supervisors, who arguably performed some executive functions. Id. at 398. The Court also suggested that, in some circumstances, attempts by Congress to vest such power in the courts might impermissibly require the courts to perform functions not judicial in nature. In such instances, the Court held, there would be "such incongruity in the duty required as to excuse the courts, or to render their acts void." Id. at 398. In our view, it would prove incongruous from a separation-of-powers perspective for a court to appoint a non-judicial officer performing functions at the core of executive power, and appearing as the executive advocate before federal courts. While the courts have for some time appointed interim United States Attorneys, the Supreme Court has never validated this practice. Moreover, existing law now recognizes the Attorney General's primary role in making such interim appointments. In any case,

interim U. S. Attorneys can be replaced at any time by the President.

Moreover, there is no merit whatsoever in the suggestion that the authority to define the prosecutor's jurisdiction is a proper incident of the court's power to appoint in the first place. Even if it could be argued, based on Ex parte Siebold, that the independent counsel may be appointed by a court, this power of appointment cannot include the power to control the exercise of executive power by the appointee, or else the court could be assigned vast expanses of executive authority. For example, if the power to appoint an independent counsel carries with it the power to expand the independent counsel's prosecutorial jurisdiction, why cannot the same be said of virtually any other prosecutorial decision that the independent counsel might make, such as the decision to seek (or not to seek) an indictment? And if the Special Division can constitutionally exercise such power as an incident of its power to appoint an independent counsel, it is difficult to see why a district court could not do the same as an incident of its power to appoint an interim United States Attorney. See 28 U.S.C. 546. In fact, the district courts have not claimed anything but the bare ability to select a qualified individual to fill such a position until a permanent successor could be found. See United States v. Solomon, 216 F. Supp. 835, 842-43 (S.D.N.Y. 1963) (rejecting a separation of powers challenge to court's appointment of United States attorney). Similarly, in Mobson v. Hansen, 265 F. Supp.

902 (D.D.C. 1967), upholding the validity of court appointment of the District of Columbia Board of Education, the court noted that it was not required to undertake any supervisory or administrative responsibilities which might have introduced "such incongruity in the duty required as to excuse the courts from its performance or to render acts void." 265 F. Supp. at 913. Indeed, in Siebold itself, the Court did not suggest that the courts should have responsibility for supervising and directing the supervisors of elections, pointing out that their duties were "entirely executive in their character," and clearly prescribed by the statutes creating their office. 100 U.S. at 897.

A related point involving the Appointments Clause is that the present statute may well impermissibly grant an independent counsel the authority to appoint his own staff. To the extent that associate independent counsels perform "significant authority pursuant to the laws of the United States," and are not mere employees, their appointments must comport with the strictures of the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 126 (1976). Because the independent counsel, an inferior officer himself, is not the head of the department (nor, obviously, is he the President or a court of law), the Appointments Clause does not permit Congress to vest such appointment authority in him alone. Thus, section 594(c) of title 28, which confers appointment power on the independent counsel, raises grave constitutional questions.

2. Judicial control of prosecutorial decisionmaking.

It seems abundantly clear that the Special Division of the United States Court of Appeals for the District of Columbia Circuit is an Article III tribunal, like every other panel of every federal court of appeals.⁸ Under the Constitution, the functions of Article III courts are confined to the exercise of "the judicial Power" of the United States, which includes

⁸Under 28 U.S.C. 49 the Special Division is statutorily chartered as a division of the United States Court of Appeals for the District of Columbia. Indeed, if the Special Division were not an Article III court, the statutorily prescribed manner of selecting its members would be unconstitutional. Under 28 U.S.C. 49, the members of the Special Division are designated by the Chief Justice from among the circuit court judges and Supreme Court justices. If the Special Division is a court, as we believe, this manner of designation raises no question under the Appointments Clause because it involves no "appointment." The eligible judges and justices have already been properly appointed to their judicial posts; in designating them for service on the Special Division, the Chief Justice would not be appointing them to any new position but would merely be assigning them to temporary, part-time service on a particular court, much as the Chief Justice and the chief judge of a circuit may assign circuit and district judges to sit on some other court when the need arises. See 28 U.S.C. 291, 292.

If, on the other hand, the Special Division is regarded as a non-Article III body, the manner of selecting its members would be constitutionally flawed. The authority conferred upon the Special Division by statute -- for example, the appointment of an independent counsel (28 U.S.C. 593(a)) and the adjudication of a civil action brought by an independent counsel contesting removal (28 U.S.C. 596(a)(3)) -- unquestionably constitute "significant authority" exercised "pursuant to the laws of the United States." See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). Thus, the members of the Special Division must be appointed in accordance with the Appointments Clause. The Appointments Clause, however, does not permit appointment by the Chief Justice. See Shartell, *Federal Judges -- Appointment, Supervision, and Removal -- Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 485 (1930). Under that Clause, principal officers must be appointed by the President, with the advice and consent of the Senate, while "inferior officers" may be appointed by the President alone, "the Heads of Departments," or "the Courts of Law."

"housekeeping" matters incidental to the judicial power (such as promulgating rules of civil and criminal procedure) as well as the core function of adjudicating and deciding cases and controversies. See Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-76 (1982); Glidden v. Zdanek, 370 U.S. 530, 550-571 (1962); Murray's Lessee v. Hoboken Land Improvement Co., 59 U.S. (18 How.) 272, 280-82 (1856); National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 629-30 (1949) (Vinson, J. dissenting) and id. at 646-55 (Frankfurter, J. dissenting). See also 2 M. Farrand, The Records of the Federal Convention of 1787 428-30 (1911); Mart and Wechsler's The Federal Courts and the Federal System 7-11, 396-97 (2d ed. 1973).

The Supreme Court has clearly and unequivocally rejected the contention that Congress could extend the jurisdiction of the Article III courts by engrafting on them duties of an executive or legislative nature. See, e.g., Gordon v. United States, 117 U.S. 697 (1864); United States v. Ferreira, 54 U.S. (13 How.) 40, 50-51 (1851); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792). These and other cases establish that the power of an Article III court to take cognizance of any matter depends upon the existence of a suit instituted according to the regular course of judicial procedure, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, Muskat v. United States, 219 U.S. 346, 352, (1911), the absence of revisory or appellate power in any other branch of government,

Hayburn's Case, supra, United States v. Ferreira, supra, and the absence of administrative or legislative issues or controversies, Keller v. Potomac Electric Co., 261 U.S. 428 (1923); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927).

This traditionally strict approach to defining the power of constitutional courts is compelled not only by the Framers' desire "to safeguard the independence of the Judiciary from the other branches," Glidden v. Zdanok, 370 U.S. at 582, but also by a concern that courts should not interfere in business "committed by the Constitution to another branch of government." Baker v. Carr, 369 U.S. 186, 211 (1962). See also Northern Pipeline Co. v. Marathon Pipe Line Co., supra, 458 U.S. at 74, in which the Court emphasized the importance of "protecting against the erosion of Article III jurisdiction by the unilateral acts of the political branches." The Court reaffirmed the principle that "where Article III does apply, all of the legislative powers specified in Article I and elsewhere are subject to it." 458 U.S. at 73. For this reason, federal courts have historically resisted congressional attempts to assign them tasks that are not directly related to carrying out their judicial functions under Article III. Given these constitutional limits on a federal court's power under Article III, any attempt by Congress to assign to an Article III court what are traditionally and quintessentially executive functions must fail. Even if we assume for purposes of argument that Article II gives courts some limited power of appointment, nothing in the Appointments Clause

or elsewhere in Article II gives courts the power to direct or supervise the functions of their appointees, other than judicial ones.

Indeed, all judicial precedent suggests that courts cannot direct the exercise of a prosecutor's discretion. Thus, in United States v. Thompson, 251 U.S. 407 (1920), the Supreme Court rejected a lower court's attempt to prevent a United States Attorney from instituting a criminal prosecution by resubmitting the matter to a grand jury. The court based its decision upon "the absolute right of the United States to prosecute," and upon "the right of the Government to initiate prosecutions for crime," a right not subject to control by judicial discretion. 251 U.S. at 412-13, 415. Similarly, in Ex parte United States, 287 U.S. 241 (1932), the Court held that a district court could not refuse to issue an arrest warrant after an indictment by a grand jury, upon application by the United States Attorney, because this would negate "the absolute right of the United States to prosecute."

Two particularly instructive cases are United States v. Cox, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965), which was cited as authority by the Supreme Court in United States v. Nixon, 418 U.S. at 693, and United States v. Cowan, 524 F.2d 504 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976). In Cox, the Fifth Circuit held that the district court had no power to compel the commencement of a prosecution through the use of its contempt power. In Cowan, the court of appeals

held that while the district court had discretion under Rule 48(a) of the Federal Rules of Criminal Procedure to refuse to permit dismissal of an indictment, it had no power to appoint special prosecutors to continue the prosecution of the action upon formal declination of the government to proceed. In both Cowan and Cox, the court of appeals grounded its holding in separation-of-powers principles. See Cox, 342 F.2d at 171 ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."); see also Cowan, 524 F.2d at 509.⁹ Other lower courts have also

⁹ In Cowan the court emphasized the distinction between the role of the court in connection with the initiation and termination of prosecutions, finding some constitutional role for the court in connection with the latter but not the former. See 524 F.2d at 508-509. In commenting on the respective roles of the prosecutor and the court under Fed.R.Cr.P. 48(a), the court noted the importance of observing the separation of powers in connection with the termination of criminal prosecutions:

... the phrase "by leave of court" in Rule 48(a) was intended to modify and condition the absolute power of the Executive, consistent with the Framers' [sic] concept of Separation of Powers, by erecting a check on the abuse of Executive prerogatives. But this is not to say that the rule was intended to confer on the Judiciary the power and authority to usurp or interfere with the good faith exercise of the Executive power to take care that the laws are faithfully executed. The rule was not promulgated to shift absolute power from the Executive to the Judicial branch. The Executive remains the absolute judge of whether a prosecution should be initiated and the first and presumptively the best judge of whether a pending prosecution should be terminated.

recognized the fundamentally and unalterably executive nature of federal prosecution of crimes. (See, e.g., Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) ("The United States Attorney, under the direction and control of the Attorney General, is the attorney for the Executive, charged with faithful execution of the laws, protection of the interests of the United States, and prosecution of offenses against the United States.") The case law thus confirms what Attorney General (later Chief Justice) Roger B. Taney concluded in 1831, namely that the President has supervisory power over the prosecution of lawsuits by United States Attorneys as a necessary consequence of "the duties imposed upon [the President] in that clause of the constitution. . . , which enjoins him to take care that the laws be faithfully executed." 2 Op. Att'y Gen. 482, 486 (1831). Thus, it is clear that our constitutional system precludes congressional or judicial interference with the President's ultimate responsibility to direct and control criminal prosecutions. And that duty has been assigned to the Attorney General since he is "the hand of the [P]resident in taking care that the laws of the United States in the prosecution of offenses be faithfully executed." Ponzi v. Fessenden, 258 U.S. 254, 262 (1922); 28 U.S.C. 516-519.¹⁰

¹⁰The courts of course possess the authority to ensure that prosecutors do not exceed their legal or ethical bounds. See e.g., Gibson v. United States, 403 F.2d. 569 (D.C. Cir. 1968); United States v. Thompson, 320 F.Supp. 527, 529 (D.D.C. 1970). Thus, for example, courts routinely review investigative or prosecutorial actions to ensure that the state has complied with the dictates of the Fourth Amendment or with statutory limitations on the scope of permissible law enforcement, see (continued...)

Accordingly, any construction of the statute that would permit the independent counsel to obtain from the Special Division of the D. C. Circuit prosecutorial jurisdiction over matters as to which the Attorney General, as the President's delegate, has decided prosecution is or has become unwarranted is invalid. Any reading of the law which would interpose the judicial decisionmaker into this exercise of executive authority impinges upon the President's constitutional authority and responsibility to oversee the executive branch. Accordingly, in order to avoid constitutional infirmity, we believe that the statute must be read to preserve the Attorney General's primary responsibility for determining which matters should be within the independent counsel's jurisdiction, and to limit the court's involvement in making actual substantive jurisdictional determinations as much as possible. The scope of the independent counsel's jurisdiction in the first instance must be determined in accordance with the Attorney General's application, and related matters brought within the independent counsel's jurisdiction only by action of the Attorney General. We will return to this and related statutory questions raised under current law in the following section.

¹⁰(...continued)

e.g., 18 U.S.C. 2516, 2518 (limiting the circumstances in which the government may conduct electronic surveillance). However, what the Supreme Court's cases make clear is that when the government is operating within its proper sphere of authority in investigating and prosecuting crimes, the other branches, including the Judiciary, may not share in the exercise of discretion reserved to the Executive by the Constitution.

II. IMPLEMENTATION OF THE PRESENT STATUTE

Before addressing the specific questions posed by Senators Cohen and Levin in their March 3, 1987, letter, I would like to make two general points about our experience under the existing independent counsel statute.

First, because the independent counsels operate outside the normal scope of Departmental responsibilities, they are unconstrained in deciding what fiscal and personnel resources they will utilize. In effect, they have a "blank check" budget. All other matters pending within the Department, by contrast, are continually subject to competition for resources. While we would prefer to prosecute all of our cases to the fullest, budget restraints dictate that the more trivial matters simply cannot be litigated.

By contrast, nothing is seemingly too trivial for the independent counsel. As former Attorney General William French Smith has observed:

Because of the high profile nature of the cases involved, the independent counsel selected have felt it necessary to undertake massive investigations, delving into minute detail and wholly irrelevant trivia. This has required the establishment of legal and investigative bureaucracies and has resulted in the process being drawn out to from five months to almost a year -- and this at tremendous personal anguish to individuals and great cost to the taxpayers.

If this statute is reauthorized in any form, the Department urges that it be given control over the resources available to independent counsels. Otherwise, the Department's only role will continue to be opening the spigots for scarce tax dollars to flow

away unchecked. Moreover, the cost is not only in dollars, but in very real human terms. Reputations and careers of decent, honest people can be destroyed, all with no real foundation, merely because the individuals happened to be holding public office. The concept of "equal justice for all" is flouted when a statute encourages such mistreatment to occur.

Second, any reauthorization should ensure that the independent counsel statute cannot be used in what are essentially political (rather than legal) disputes, such as disagreements between the Executive Branch and Congress. Former Attorney General Smith has raised the issue that the statute "has been used more for political purposes and media appetite than to achieve justice." It should be made clear that inquiries by independent counsel should be directed solely to possible criminal violations. These inquiries should not be triggered by the course of legitimate disputes between branches where important constitutional issues are involved.

In their letter of March 3, 1987, Senators Cohen and Levin ask that, in the course of the Department's testimony at the hearing, we address a number of specific issues concerning the Ethics in Government Act. I will address each of these issues in the order they were raised in the letter of the Chairman and Ranking Minority Member.¹¹

¹¹ Senator Levin had previously sent a list of questions by letter dated February 2, 1987. His letter and my response, on March 13, 1987, are attached hereto at Tab A.

Senator Levin, by letter of February 12, 1987, also inquired
(continued...)

1. The letter first asks whether the Department has declined further investigation or prosecution because evidence that one of the elements of a crime, in particular the element of criminal intent, is missing or insufficient.

Such a conclusion can be a reason both for declining to initiate a preliminary investigation and for declining to seek appointment of an independent counsel after conclusion of an investigation. Under the independent counsel provisions of the Act, there must be sufficient credible information to warrant investigation of whether a "covered" person has committed a federal offense in order to require the initiation of a preliminary investigation. For example, one element of a violation of 18 U.S.C. 1621 (perjury) is that the individual must have taken an oath to testify truthfully. If, in investigating a perjury allegation against a covered person, we determine that no oath was administered, then an essential element of the offense would be missing. The individual could not be prosecuted for perjury. Accordingly, in such circumstances, an independent counsel would not be sought to pursue the allegation of perjury (although, of course, we would explore in such a case whether other criminal statutes would be applicable).

¹¹(...continued)
about the role of the Office of Professional Responsibility of the Justice Department in inquiries concerning the Attorney General as they relate to the investigation of Ambassador Faith Ryan Wittlesey and the investigation of the Iran/Contra matter. Senator Levin's letter, and my response, on March 13, 1987, are attached hereto at Tab B.

Another common example is when evidence of criminal intent, an element of virtually every crime, is missing. Absent some reasonable ground to conclude that criminal intent may exist or that further investigation may show it to exist, there are no grounds to warrant further investigation.

Of course, criminal intent can rarely be proved directly; it is usually demonstrated, even in the context of a trial, circumstantially. Therefore, in assessing whether there is sufficient specific and credible information suggesting criminal intent to warrant further investigation, the Department looks to all the facts and circumstances known to it, and decides whether it would be reasonable to conclude that criminal intent might be present. The standard for proceeding is not high; the question is whether a reasonable prosecutor would conclude that the circumstances are such as to warrant further investigation into the matter. However, the Department does not rely on speculation. Unless the facts and circumstances provide a reasonable basis for concluding that a crime may have been committed, no preliminary investigation will be conducted, and no independent counsel will be sought.

To illustrate the way this standard works in practice, we describe, as you request, the decision made in each case under the Act that has been made public. Obviously, there have been similar determinations in cases that have remained confidential, but the following will provide the Subcommittee with a good

overview of the reasons why the Department may decline to proceed in an independent counsel matter.

a. Allegations in House Judiciary Committee Report against persons covered by the Act other than those against Mr. Olson, Mrs. Dinkins, and Mr. Schmuts: A number of other covered individuals were criticized in the House Judiciary Committee Report, but it was the Department's conclusion that, with the exception of the above three individuals, no preliminary investigation was warranted. The Report's criticisms in many circumstances constituted allegations of carelessness or negligence, but in each case there were no facts or circumstances suggestive of criminal intent.

b. Space Shuttle allegations: The Department received allegations that the White House had interfered with the inquiry into the circumstances surrounding the Challenger explosion. After analysis of the allegations and the facts to support them, we concluded that no preliminary investigation was warranted because the allegations were not supported by evidence that, if true, would constitute a federal crime.

c. CIA/Contra training manual: No covered individual was ever identified as having been responsible for the preparation of the controversial Contra training manual (prepared under CIA auspices). Moreover, the Department concluded that no preliminary investigation was necessary because the facts known to it did not suggest that preparation of the manual violated any federal criminal law.

d. Mining of the Nicaraguan harbor: Allegations were made that the CIA had assisted or participated in placing mines in a Nicaraguan harbor, and it was suggested that this conduct violated the Neutrality Act, 18 U.S.C. 956. The Department concluded that even if the allegations were true, the Neutrality Act did not apply to the authorized conduct of executive branch personnel, and thus the conduct alleged did not constitute a federal crime. A further explanation of the Department's interpretation of the Neutrality Act is set out in its brief in the case of Dellums v. Smith, 797 F.2d 817 (9th Cir. 1987), which is being submitted separately for the record.

e. Contra aid allegations: Other general allegations were received in 1984 concerning aid to the Contras, and the same legal determination described in example "d." governed.

f. President Carter briefing book inquiry: At the request of President Reagan, an extensive inquiry was conducted into the circumstances surrounding the acquisition by Reagan campaign workers of a copy of briefing materials prepared for President Carter. No evidence was ever developed that the documents were obtained by theft rather than by other lawful means, or that any other federal criminal law had been violated.

g. Former Deputy Attorney General Edward Schmults: At the conclusion of a preliminary investigation, we decided that the evidence of criminal intent on Mr. Schmults' part was too weak to justify a prosecution, and that further investigation would not

develop additional evidence of criminal intent. Therefore, the appointment of an independent counsel was not requested.

h. Former Deputy Attorney General Carol Dinkins: The same decision that governed the outcome with regard to Mr. Schmuts dictated that no independent counsel should be sought concerning the allegations against Mrs. Dinkins.

i. Ambassador to Switzerland Faith Ryan Whittlesey: Allegations that Ambassador Whittlesey had misused funds available to her and had engaged in improper hiring were found not to trigger a preliminary investigation because of lack of evidence of a federal criminal offense. However, a separate allegation of her alleged attempted obstruction of the inquiry into these matters did result in a preliminary investigation. At the end of the preliminary investigation, no independent counsel was sought because no criminal conduct was found, using the standard principles of federal prosecution. The Attorney General determined that it would be contrary to the established policies of the Department to proceed on such a case, and the Act specifically charges the Attorney General to comply with such established policies in making his decisions under the Act.

As you can see, a determination that some crucial element of proof is lacking has been a reason to decline to initiate a preliminary investigation or to decline to seek appointment of an independent counsel. Any change in the standard to eliminate this factor as one on which to base a decision not to proceed with a preliminary investigation or the appointment of an

independent counsel would be contrary to normal prosecutorial decision-making, which the Act is designed to track as much as possible, and unjust to the potential subjects of investigation.

As one example, if the presence of a reasonable indication of criminal intent were eliminated as a prerequisite to the initiation of a preliminary investigation, an independent counsel would have to be appointed every time it came to light that a covered person had made an error on his or her financial disclosure form or income tax return, even if there were no direct or circumstantial evidence to support an inference that the misstatement was made with criminal intent. The resulting burden on innocent federal officials and the waste of prosecutorial resources would be substantial, unfair, wholly inappropriate, and unnecessary.

2. You next ask whether: (a) a private party who submitted allegedly sufficient evidence to the Attorney General; (b) a House or Senate Judiciary Committee; or (c) anyone else ought to be able to obtain judicial review of the Attorney General's decision in a particular matter that no preliminary investigation is warranted. The brief answer, in each case, is "no." Judicial review of these matters would be inappropriate under any circumstances, and would necessitate wholesale judicial intervention into the prosecutorial function, permitting the second-guessing of experienced prosecutors' assessment of credibility and the criminal potential of oftentimes vague and unsubstantiated allegations. The courts are not institutionally

equipped to take over the supervision of the constitutionally based law enforcement responsibilities of the Executive Branch. As the former Chief Justice has pointed out, "few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings[.]" Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.). That observation applies with equal weight to the prosecutor's initial decision whether or not to initiate a criminal investigation. The Attorney General's sworn obligation to uphold the law, the public attention focused on most of these matters, and the congressional oversight built into the Act provide ample assurance that the law will be fairly and evenhandedly enforced.

Finally, any provision for judicial review at the behest of Congress would raise serious constitutional problems. The Constitution specifically excludes Congress from the decision whether to prosecute particular cases by providing that "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, sec. 9, cl. 3. A legislative effort to require prosecution of a specific individual has many of the attributes of a bill of attainder and would be inconsistent with the policies upon which the Constitution's prohibition against bills of attainder was based.

In 1977 and again in 1982, Congress specifically rejected various proposals for judicial review of the Attorney General's

decisions under the Act, and the wisdom of that decision has stood for ten years. It should not be altered now.

3. The subcommittee asks several questions relating to the scope of section 594(e) of title 28. Section 594(e) states in relevant part that the "independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction." Before turning to constitutional issues we believe are raised by this provision, I will speak to certain technical questions dealing with the interpretation of the statute.

First, Senators Levin and Cohen have asked the purely statutory question whether a matter "related to the independent prosecutor's prosecutorial jurisdiction" includes related matters involving persons not within the independent counsel's initial grant of jurisdiction. By its terms, the language employed appears broad enough to include such related persons, and nothing in the legislative history of the Act suggests otherwise. Indeed, in discussing the initial definition of prosecutorial jurisdiction under section 593, the 1978 Senate Report suggests that the phrase "related matters" includes "any potential co-conspirators." S. Rep. No. 170, 95th Cong., 2d Sess. 64 (1978). This provides general support for the proposition that Congress construed the term "related matters" broadly enough to sweep in related persons. Such a construction, moreover, seems sensible in light of the fact that investigation of matters within the independent counsel's jurisdiction may produce evidence

implicating other persons in criminal wrongdoing. Construing that section not to permit the independent counsel to request further jurisdiction over additional persons would unnecessarily impair the statutory mechanism to an extent the Department believes Congress could not have intended.

This conclusion, of course, is subject to the Department's further conclusion that the Attorney General's refusal to refer related matters is dispositive with respect to the independent counsel's ability to obtain any further jurisdiction, whether it be over related violations or related persons. Our analysis in this respect has both a statutory and a constitutional component. First, as a matter of statutory construction, the structure of the Ethics in Government Act makes it implausible to suggest that the independent counsel may obtain expanded jurisdiction from the court once the Attorney General has rejected such a request. Under section 592(b) of title 28, the Attorney General has initial authority to decide not to refer matters to an independent counsel at all. As the D. C. Circuit held in Banzhaf v. Smith, 737 F.2d 1167, 1169-70 (D.C. Cir. 1984), Congress made the Attorney General's decision unreviewable in any court. This unreviewability would be effectively negated if the court could later, in the context of a request under section 594(e), give the independent counsel jurisdiction over precisely the matters that the Attorney General had earlier refused to refer. It would not therefore, be sensible to construe section 594(e) to allow the Special Division of the D.C. Circuit to expand the independent

counsel's jurisdiction when the Attorney General has previously refused to do so. In any event, any such construction that would allow the court to override the Attorney General's exercise of prosecutorial discretion would render the provision unconstitutional.

When the Attorney General, as the President's agent for enforcement of the criminal laws, decides whether to prosecute a particular matter, that decision, under well-established Supreme Court case law, must be viewed as purely executive in nature. United States v. Nixon, 418 U.S. 683, 693 (1974); Heckler v. Chaney, 470 U.S. 821, 832 (1985) (dictum). Thus, the independent counsel may not constitutionally obtain prosecutorial authority over a related matter from the Special Division of the D.C. Circuit once the Attorney General has denied the independent counsel's request for such additional prosecutorial authority. Allowing a court to override the Attorney General's decision not to go forward with an investigation or prosecution would amount to an impermissible judicial intrusion into a sphere of action constitutionally reserved to the executive.

Judicial review of prosecutorial discretion, moreover, offends the limitations placed by Article III on the federal courts. Certain prosecutorial decisions may culminate in actions that are subject to judicial review: for example, determining whether there is probable cause for a search or seizure under the Fourth Amendment, or measuring a prosecutor's decision to take a particular action, such as electronic surveillance of a suspect,

against statutory protections enacted by Congress to safeguard the privacy of suspects. 18 U.S.C. 2516, 2618. However, such decisions constitute traditional judicial determinations regarding the substantive limitations imposed on executive action by the rights guaranteed to individuals under the Constitution and by statute. These decisions in no way purport to dictate how the executive should exercise the constitutional prosecutorial discretion. For this reason, the Attorney General must be able to determine conclusively, without judicial contradiction, when the independent counsel should obtain jurisdiction over related matters.

4. You have asked whether the Department considers all materials gathered by an independent counsel to be grand jury material protected from disclosure by Rule 6(e) of the Federal Rules of Criminal Procedure. An independent counsel is in the same position as any other federal prosecutor with regard to Rule 6(e); materials compiled by an independent counsel are not Rule 6(e) material unless they constitute matters occurring before a grand jury, as that phrase has been interpreted. Thus, for example, transcripts of grand jury proceedings conducted by an independent counsel would be protected by the provisions of Rule 6(e), while copies of documents provided to the independent counsel voluntarily by a subject of the investigation are not. This does not, of course, mean that the documents might not be protected from disclosure by the operation of other provisions of law or policy, but Rule 6(e) would not apply.

5. Your letter next asked whether investigative material gathered by an independent counsel ought to be shared with others with a potential interest in the investigation. An independent counsel should retain control over the confidentiality of materials in his or her files during the course of the investigation. Upon conclusion of the investigation, we believe that the files should be handled with even stricter confidentiality than other federal criminal files. The independent counsel statute itself contemplates extensive confidentiality protections. See 28 U.S.C. 592(b)(3) and (d)(2). Surely, those matters which do not rise to the level of a preliminary investigation should not be disclosed. It would be illogical to protect the innocence and privacy of those who have withstood a preliminary investigation, and then ignore the same concerns for others who never even reached that stage. Those that have reached the level of a preliminary investigation but have not received much public attention should also remain sealed to protect the privacy of the individuals involved. As to those matters which have received considerable public attention, the Department has routinely moved, pursuant to 28 U.S.C. 592(b)(3), for leave to make the memoranda filed pursuant to section 592(b)(2) public. We believe that whatever filings are made public by leave of the court are sufficient for full congressional review. This policy serves to ensure that the rights of innocent individuals who may be identified in law-enforcement files are protected; that sensitive-law enforcement

strategy, techniques, or methods are not needlessly disclosed; that the safety of confidential sources is protected; and that the privacy of innocent people is not compromised.

This does not mean that information gathered by an independent counsel must be locked away for all time. You ask specifically whether such information ought to be shared with federal or state prosecutors investigating crimes within their respective jurisdictions. We believe that to the extent it is possible to share investigative information relevant to another prosecutor's investigation without jeopardizing the independent counsel's investigation, he or she should do so. Indeed, there is historical precedent for such sharing of information, and we believe that cooperation between the Department and the independent counsels appointed to date has been excellent. On the other hand, except when the target of a criminal investigation has a specific statutory or constitutional right to access to investigative information, the decision whether to provide access ought to be left to the sole discretion of the independent counsel.

6. In response to your request for an explanation of the Department's position in Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986), I have delivered to the Subcommittee a copy of the Department's brief in the matter setting out its legal position with regard to the Neutrality Act. The Department's view that the Neutrality Act does not, as a matter of law, reach the official conduct of executive branch officials is still in

effect. It is not, as your letter implies, that we have a "policy" that "exempts" officials from that statute. Accordingly, we view the rest of your question as moot.

7. You ask whether the independent counsel statute should provide for a disinterested or adversarial review of a request for attorney's fees. We suggest that the statute be amended to provide for the payment of attorney's fees of an absolved subject at the same rate as is provided for the compensation of the Independent Counsel, *i.e.*, at a per diem rate not to exceed that provided for Executive Level IV under section 5315 of Title 5. In the alternative, we would propose that a statutory mechanism be adopted to provide for the review of the requested attorney's fees by the Department of Justice, with the authority to intervene to represent the interests of the United States with regard to the request.

8. The Subcommittee's final question is whether the Department of Justice standards of conduct are applicable to independent counsel and their staff. The Department of Justice believes that, as a general matter, independent counsel and their staff are and should be subject to the same high standards of ethical conduct embodied in 28 C.F.R. 45-735, which are applicable to all officers of this Department. These standards incorporate the requirements of the criminal conflict of interest laws, which apply to all officers and employees of the Executive Branch. They also incorporate many of the rules of attorney conduct required by the codes of professional responsibility and

relevant court rules, with which independent counsel, as members of the bar, must comply.

Of course, the applicability of any particular provision of the standards of conduct, including those that derive from the criminal conflict of interest laws, may depend upon the terms of an individual's government appointment. For example, certain provisions of the criminal conflict of interest laws have only a limited applicability to "special government employees" -- persons whose appointments are not expected to extend for more than 130 days in any period of 365 days. See 18 U.S.C. 202(a). Thus, the prohibition in section 209 of Title 18 pertaining to the receipt of any supplementation of a government salary from a nongovernmental source would not apply either to such special government employees, or to individuals who receive no pay from the government. It is our understanding that most, if not all, of the existing independent counsel and their staffs have been appointed by the court as "special government employees." If this is true, then section 209 would not prohibit independent counsel and their staff from continuing to receive compensation from their law firms during their period of federal service. However, as discussed below, independent counsel appointed as special government employees may be prohibited by 18 U.S.C. 203 from sharing in fees generated by representations before the Department of Justice or another office of independent counsel.

Moreover, section 208 of Title 18, which prohibits a government official from participating in a matter in which he or

she has a financial interest, applies with full force to special government employees. Similarly, the post-employment restrictions of 18 U.S.C. 207 apply to special government employees, and limit such individuals' ability to participate after leaving the government in matters in which they participated, or for which they had responsibility, while in government service. Section 207(c) imposes additional restrictions on certain senior level employees, who are forbidden to contact their former agency for a period of one year after leaving government service.

Sections 203 and 205 of Title 18 generally prohibit executive branch employees from acting as agent or attorney for a private party before any other government agency, and from receiving any money derived from such representations. Special government employees are subject to these restrictions in a limited form: they are forbidden to undertake or continue private representations only insofar as the matter is one in which he or she has personally participated as a government employee, or is a matter "pending in" the department or agency in which he or she is serving. We believe that independent counsel and their staff are subject to these last-mentioned conflict of interest laws, and that they may not represent a private party in any matter pending in the Department of Justice, or before any other independent counsel.

This conclusion should not be startling. After all, the independent counsel may use the records, files, and personnel of

the Department, and by statute they are expected to follow the policies of the Department regarding enforcement of the criminal laws. Moreover, for good cause, the independent counsel is removable by the Attorney General. Perhaps most importantly, an independent counsel's primary responsibility is to exercise the prosecutorial and investigative powers of the Department of Justice. It would be inconceivable under our system of justice to imbue an independent counsel with these substantial prosecutorial powers and then not expect such independent counsel to comply with the same ethical responsibilities as other officers of this Department. If anything, one would expect more, not less, prudence and integrity from those serving as an independent counsel.

On a practical level, we would expect that all concerned, including independent counsel and their staff, would seek to avoid circumstances in which they could either exert undue or inappropriate influence upon the Department of Justice, or appear to do so, on behalf of their private clients. We think, for example, that it would be entirely inappropriate for a person who is representing the United States as independent counsel to simultaneously negotiate as private counsel the terms of an appearance for a witness or target of an unrelated federal grand jury. In addition to the awkwardness of the situation from the perspective of the federal prosecutor, the grand jury and the public might reasonably question whether any arrangements ultimately made with respect to the private client were

influenced by the independent counsel's special position, access to, or knowledge of the Department of Justice. Furthermore, the ultimate conclusion of the independent counsel's federal investigation might be viewed as suspect because of contact between the independent counsel and the Department on the private matter.

For the same reasons, we believe that the post-employment restrictions contained in 18 U.S.C. 207(c) prohibit the independent counsel and any senior-level staff to whom this section applies, from communicating with this Department on any matter on behalf of a private party for a period of one year after their federal service is ended. To be sure, this provision must be construed in a reasonable and workable manner. In this regard, the statute provides a method for narrowing the impact of this restriction by permitting agencies to be subdivided into components, pursuant to a designation approved by the Office of Government Ethics, thereby restricting many senior level employees from contact only with their employing component (and certain other offices in the Department that supervise or otherwise have contact with their component). See 18 U.S.C. 207(d)(1)(C); 207(e); 5 C.F.R. 737.13. An independent counsel, himself, is not able to take advantage of this mitigating provision of the statute, since it does not apply to the head of a component; however, other senior level employees on the independent counsel's staff would benefit if the office were designated as a separate statutory component.

Our experience to date in connection with applying generally applicable standards of conduct to independent counsel and their staff does not suggest the need for any changes in the Department's regulations, or in the relevant statutes. We are bolstered in this belief by the fact that the Office of Government Ethics has reached similar conclusions respecting the relationship between the independent counsel and this Department under the conflict of interest laws. While questions will undoubtedly arise in the future about the application and enforcement of these standards in the case of independent counsel, we have no reasons to believe these questions cannot be handled within the existing legal and regulatory framework.

III. RECUSAL OF THE ATTORNEY GENERAL

Senator Levin and Senator Cohen submitted to the Attorney General a letter dated February 25, 1987, that focuses on the issue of the recusal of Attorneys General from consideration of various independent counsel matters, including the standards and procedures by which such recusal decisions are made.

Before I respond to your specific questions, I would like to make a few general points about recusal. Every practicing lawyer knows that recusal decisions are each inherently unique, and can only be made honestly by the individual directly affected. Moreover, a decision not to recuse, although always subject to unfounded criticism, is typically the far more courageous course of conduct. The Attorney General is the principal legal adviser to the President, confirmed by the Senate as such. He is specifically named in the independent counsel provisions as the critical decision maker. We believe that the general presumption should be that the Attorney General will not recuse himself from independent counsel matters. As former Attorney General William French Smith has written to the Subcommittee: "I believe that the Attorney General should recuse himself only in the most extraordinary circumstances."

We concur with the former Attorney General's conclusion that:

Attempting to prescribe by rules, standards and regulations how to exercise this judgment in doubtful cases in my view would be futile and unwise -- another artificial effort to legislate an ethical standard.

We are proud of our record on recusal with respect to the independent counsel statute, and welcome this opportunity to discuss it with you.

The Attorney General adheres to the same strict ethical standards in deciding matters relating to independent counsels as he does in any other matter that comes before him in his official capacity. It bears noting, however, that recusal decisions under the independent counsel statute are necessarily different from recusal decisions in other settings. The independent counsel statute is itself a recusal statute: its provisions are invoked precisely because of the statutory presumption that the entire Department of Justice has a conflict of interest that would require the Attorney General's disqualification in cases involving covered individuals. It is because of this presumed conflict of interest that the statute restricts the role the Attorney General may play in the investigative and prosecutorial process. Because Congress has already determined that the Attorney General should be permitted to perform that limited role even in cases where a conflict is presumed, the standard governing disqualification decisions may be less restrictive in cases arising under the independent counsel statute than it is in cases in which the Department handles all aspects of the investigation and prosecution.

That said, however, we believe that in all of his decisions on independent counsel matters, the Attorney General has been in total compliance with 28 C.F.R. Sec. 45.735-4 and 5, the

Departmental regulations concerning disqualification of any Department employee arising from personal or political relationships or private financial interests. They provide that:

Sec. 45.735-4 Disqualification arising from personal or political relationship.

(a) Unless authorized under paragraph (b) of this section, no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with:

(1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

(2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

(b) An employee assigned to or otherwise participating in a criminal investigation or prosecution who believes that his participation may be prohibited by paragraph (a) of this section shall report the matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher. If the supervisor determines that a personal or political relationship exists between the employee and a person or organization described in paragraph (a) of this section, he shall relieve the employee from participation unless he determines further, in writing, after full consideration of all the facts and circumstances, that:

(1) The relationship will not have the effect of rendering the employee's service less than fully impartial and professional; and

(2) The employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution.

(c) For the purposes of this section:

(1) "Political relationship" means a close identification with an elected official, a candidate (whether or not successful) for elective,

public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof; and

(2) "Personal relationship" means a close and substantial connection of the type normally viewed as likely to induce partiality. An employee is presumed to have a personal relationship with his father, mother, brother, sister, child and spouse. Whether relationships (including friendships) of an employee to other persons or organizations are "personal" must be judged on an individual basis with due regard given to the subjective opinion of the employee.

(d) This section pertains to agency management and is not intended to create rights enforceable by private individuals or organizations.

Sec. 45.735-5 Disqualification arising from private financial interests.

(a) No employee shall participate personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, the following described procedure:

(1) The employee shall inform the head of his division of the nature and circumstances of the matter and of the financial interest involved and shall request a determination as to the propriety of his participation in the matter.

(2) The head of the division, after examining the information submitted, may relieve the employee from participation in the matter, or he may submit the matter to the Deputy Attorney General with recommendations for appropriate action. In cases

so referred to him, the Deputy Attorney General may relieve the employee from participation in the matter or may approve the employee's participation in the matter upon determining in writing that the interest involved is not so substantial as to be likely to affect the integrity of the services which the Government may expect from such employee.

(b) The financial interests described below are hereby exempted from the prohibition of 18 U.S.C. 208(a) as being too remote or too inconsequential to affect the integrity of an employee's services in a matter:

The stock, bond, or policy holdings of an employee in a mutual fund, investment company, bank or insurance company which owns an interest in an entity involved in the matter, provided that in the case of a mutual fund, investment company or bank the fair value of such stock or bond holding does not exceed 1 percent of the value of the reported assets of the mutual fund, investment company, or bank.

When the Attorney General does determine to recuse himself, the decision-making authority automatically reverts to the Deputy Attorney General pursuant to 28 U.S.C. 508(a); See also 28 C.F.R. O. 132.

When the Attorney General first learns that the Department has received allegations involving a person whose presence in the case may require his recusal, he decides then whether to recuse himself. He consults with such other officials of the Department as he deems appropriate. The present Attorney General has recused himself in two instances which are public, those involving Mr. Deaver and Mr. Nofziger. The Attorney General is, however, constantly alert to the applicable ethical requirements; should new information be provided to him later in the process,

he would always be prepared to reconsider his initial decision to participate in the matter, taking into account the totality of the circumstances.

In the cases of Messrs. Deaver and Nofziger, the Attorney General concluded that his long-standing personal and professional relationships precluded his involvement in any way, a conclusion he reached immediately on learning of the allegations against them. In both cases, as stated above, the decision-making authority, after the Attorney General's decisions, vested automatically in the Deputy Attorney General.

Your February 25, 1987, letter also asks about a number of instances in which the Attorney General decided that recusal was inappropriate. As to the matter involving Theodore Olson, Edward Schmults and Carol Dinkins, the Attorney General concluded that none of them had ever been subordinates of his, and that he had no personal, political or financial relationship with them that required his recusal. The performance of their official duties in no way distinguished them from any of the hundreds of other officials of the Executive Branch, and as to whom the Attorney General could be called upon to make an independent counsel decision. The Attorney General had met Mr. Schmults when they were college students, but the Attorney General's relationship with Mr. Schmults was no closer than that of several hundred other acquaintances from college and law school days. The Attorney General's decision not to recuse himself was when he first learned that the Department had received credible and

specific allegations involving the three individuals, which followed the Department's review of the House Judiciary Committee's report on the EPA matter.

With respect to Mrs. Whittlesey, I have, as you know previously stated in correspondence with Congressman Mica and Congresswoman Snowe that:

His [the Attorney General's] knowledge of and relationship with Mrs. Whittlesey has not historically been of such a close nature that it would prevent him from making an impartial judgment or present even an apparent conflict of interest. During her tenure at the White House, Mrs. Whittlesey stood in essentially the same position as scores of other Administration appointees as to whom the Attorney General could be properly called upon to seek appointment of an independent counsel. In this regard, the Attorney General acts much like a Member of Congress who sits on the Committee on Standards of Official Conduct and reviews charges lodged against a colleague. Moreover, when he was Ambassador Whittlesey's guest at a dinner party for Swiss parliamentarians in Bern, Switzerland, he had no knowledge of any of the details of the funding for that event. Indeed, his treatment at Bern was no different than the hospitality typically extended to a visiting Cabinet Member, and no different from that extended to the Attorney General by numerous other American Ambassadors in other foreign countries.

It is also worth noting that the Attorney General's decision not to seek an independent counsel paralleled conclusions your Subcommittee reportedly reached after close examination of the facts, including eight hours of interviews with Ambassador Whittlesey herself.

As in all other cases, the Attorney General made his decision not to recuse himself at the time he first learned of the allegations against Mrs. Whittlesey. The Attorney General's relationship with Mrs. Whittlesey was much the same as the many other officials who are "covered persons" under the statute.

The Iran/Contra matter involved essentially the same considerations as the two matters just discussed. In any event, in that case, the Attorney General applied for the appointment of an independent counsel, as he also did with respect to Theodore Olson.

IV. LEGISLATIVE REVISION OF THE INDEPENDENT COUNSEL STATUTE

Proposals for modification of the independent counsel statute must address the two elements of the current statute that raise the fundamental constitutional questions: namely, the mechanisms for appointment and removal of the independent counsel. No change in the circumstances warranting appointment of an independent counsel, or in the powers vested in that independent counsel by statute, need be made to ensure the constitutionality of the office. Similarly, in our view, the preliminary investigation mechanism in existing law could remain in place, and the conditions under which the Attorney General determines that appointment of an independent counsel is necessary could remain as well. Moreover, we are confident that a statutory formulation can be devised which is both constitutionally sufficient and capable of ensuring public integrity. We are working on such a draft now and we will be pleased to work with you as we proceed.

Under any such proposal, we envision that once appointed the independent counsel would operate independent of the Attorney General pursuant to appropriate regulation and would be authorized to exercise the full powers of the Attorney General in connection with any matters within his jurisdiction.

Finally, under existing law, the independent counsel could be removed from office only upon personal action of the Attorney General. History suggests that the political process and public opinion are a very powerful and effective check on the Attorney

General's exercise of his discretion in connection with removal of an independent counsel.

* * * * *

The Department of Justice looks forward to working closely with Members of the Subcommittee as it considers reauthorization of the independent counsel provisions. I would be pleased to answer any questions you may have.

TAB A

United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-8280

February 2, 1987.

The Honorable Edwin Meese, III
The Attorney General
Department of Justice
Constitution Avenue and Tenth Street, N.W.
Washington, D.C. 20530

Dear Mr. Attorney General:

As the Senate subcommittee with jurisdiction over Title VI of the Ethics in Government Act, governing the appointment, authority and duties of independent counsel, 28 U.S.C. 591-98, the Subcommittee on Oversight of Government Management is engaged in a comprehensive review of Title VI for purposes of its reauthorization and possible amendment. Since the last reauthorization in 1982, several areas of concern have developed over the implementation of the statute. In order to determine whether, and if so what, changes should be made in Title VI, we need to examine the decisionmaking process of the Department in all cases handled under Title VI since 1982.

Please provide the following information by Tuesday, February 17, 1987.

1. Case Statistics

a. Please provide a list, by an identifying name or case number, of all cases the Department has handled under Title VI since January 1, 1982. This list should include all cases which the Department has reviewed for possible processing under Title VI, even those which the Department later determined were outside the Title's coverage, did not warrant a preliminary investigation, or did not otherwise warrant further consideration under Title VI. Because of congressional concern for confidentiality in certain cases, the Subcommittee is prepared to take necessary steps to safeguard the confidentiality of the information the Department provides, where appropriate.

The Honorable Edwin Meese, III
February 2, 1987
Page Two

b. In addition, please list which of the above cases fall into each of the following categories:

- (1) Cases in which the Attorney General determined that the information received did not apply to a person covered by Title VI;
- (2) Cases in which the Attorney General determined that the information applied to a person covered by Title VI, but that a preliminary investigation was not warranted;
- (3) Cases in which the Attorney General determined that a preliminary investigation was warranted;
- (4) Cases in which the Attorney General filed a memorandum with the Independent Counsel Division of the Court of Appeals for the D.C. Circuit ("Court") concluding no further investigation or prosecution was warranted and no independent counsel was needed;
- (5) Cases in which the Attorney General filed an application with the Court for the appointment of an independent counsel; and
- (6) Cases from which the Attorney General recused himself.

2. Departmental Procedures

Please provide a detailed description of the procedures followed by the Department in the following areas. Please include in each description who has decisionmaking authority; whether that person receives staff recommendations; what special procedures, if any, apply to cases originating in U.S. Attorneys' offices; and what documentation internal to the Department is associated with the decisionmaking process.

a. Procedures to determine which cases are covered by Title VI;

b. Procedures to determine whether a preliminary investigation under Title VI should be initiated in a particular case;

c. Procedures to determine whether an independent counsel should be requested in a particular case;

d. Procedures to handle requests from independent counsel for additional prosecutorial jurisdiction; and

The Honorable Edwin Meese, III
 February 2, 1987
 Page Three

e. Procedures to determine when an Attorney General should recuse himself from a case under Title VI.

3. The 90-Day Period

a. What are the Department's established rules for determining the date on which information is "received" under 28 U.S.C. 592(a)(1) and (c)(1)? Who makes that determination in a particular case? What special rules, if any, apply to cases originating in a U.S. Attorney's office?

b. For each case listed in answer to Question 1(b)(2) and (3) above, how many days elapsed between the date the information was "received" in the case and the date the decision was made whether or not to initiate a preliminary investigation?

c. Who monitors the 90-day period and what procedures are followed to be certain that a preliminary investigation under the Act is not continued beyond the final date of the 90-day period? What special procedures, if any, apply to cases originating in a U.S. Attorney's office?

d. For each case listed in answer to Question 1(b)(4) and (5) above, how many days elapsed between the start of the 90-day period and the date that a filing was made under 28 U.S.C. 592 determining the need for an independent counsel?

4. Prosecutorial Jurisdiction

a. How many times since January 1, 1982, has an independent counsel asked the Attorney General, under 28 U.S.C. 594(e), for referral of a matter related to his or her prosecutorial jurisdiction? For each incident, please identify the case, indicate whether the Attorney General complied with the request and, if not, the basis for the refusal.

b. How many times since January 1, 1982, has an independent counsel asked the Attorney General otherwise to alter his or her prosecutorial jurisdiction? For each incident, please identify the case, indicate whether the Attorney General complied with the request and, if not, the basis for the refusal.

The Honorable Edwin Meese, III
February 2, 1987
Page Four

5. Other Information

Please provide any other information which the Department would like the Subcommittee to consider during its review of Title VI.

6. Documents

To conduct a meaningful review of Title VI, the Subcommittee requires access to: (a) all written Departmental procedures and guidelines governing the handling of cases under Title VI, and (b) those documents in the possession of the Department which pertain to cases handled under Title VI since January 1, 1982 (including any case reviewed for possible processing under Title VI). Because this request may involve a significant number of documents and documents which may contain information best kept confidential or which may not be necessary for the Subcommittee's inquiry, we prefer to work out an arrangement to obtain access to such documents without necessarily requiring the copying of each item.

Elise J. Bean, Subcommittee counsel, will be calling your office on Friday, February 6, to discuss arrangements for obtaining access to the requested documents. If your staff wishes to talk to her about the request before then or to ask any other questions, Ms. Bean can be reached at 224-3682.

Thank you for your cooperation.

Sincerely,



Carl Levin
Chairman
Subcommittee on Oversight of
Government Management

CL:ejb



U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Carl M. Levin
Chairman
Subcommittee on Oversight of
Government Management
United States Senate
Washington, D.C. 20510

13 MAR 1987

Dear Mr. Chairman:

This letter will respond to your letter of February 2, 1987 requesting information concerning the Department of Justice's administration of the independent counsel provisions of the Ethics in Government Act (hereinafter, "the Act").

Preliminarily, I would like to emphasize that while we would be happy to work with you and your staff to ensure that you receive the information you need to consider the possible renewal of the Act, special considerations of confidentiality in this area apply that restrict disclosure of some of the information you have requested. First of all, the Ethics in Government Act itself places strict limitations on the information the Justice Department can release concerning cases handled under the Act. Sec. 5, e.g., 28 U.S.C. §592(b)(2). Second, a number of the questions you ask concern matters that are under active criminal investigation by independent counsels. The risk of jeopardizing those investigations by revelation of details concerning the preliminary investigation done by the Department would be substantial, as I am sure you can appreciate. Finally, in a number of matters handled under the Act, inaccurate allegations and misleading information that would be extremely harmful to the reputations of innocent persons are involved. Therefore, there will be times when I must decline to provide you information in the form requested, though I am sure we can work with your staff to communicate the Department's views concerning any given issue. With those caveats in mind, the following responds to your questions in the order asked.

1. Case Statistics

a. The following lists include all matters processed by the Department as Independent Counsel matters, or considered for handling under the Act. However, in addition to the matters

- 2 -

listed below, there are a number of matters technically included in the broad scope of the questions you ask which we have no way of recapturing for you. For example, each time we receive an inquiry from an investigative agency as to whether an Assistant Secretary of an executive branch agency is covered by the Act, and each time we respond to a citizen complaint demanding appointment of an independent counsel to investigate a state judge, our response would be technically included in the response to question b.(1), since Assistant Secretaries and state judges are not, of course, covered persons. We have no means at this point of segregating out such matters, beyond noting that numerous such inquiries and responses are made. The lists below should, however, include all matters of interest to you.

Finally, we note that the lists include only those matters handled since the amendments to the Act became effective in January 1983, since your letter states that you wish to review the Department's handling of independent counsel matters since the last reauthorization of the Act. In cases in which the allegation and its outcome are public knowledge, we include the name of the subject; other matters, including those which are still under seal of the court, are indicated only by the number of matters handled.

- b. (1) Cases in which it was determined that the information received did not apply to a person covered by Title VI:
 - 1. Former Deputy White House Counsel Richard Hauser
 - 2. Former Vice-Presidential candidate Geraldine Ferraro
 - 3. Vice Admiral John Poindexter
 - 4. This determination was also made with regard to allegations against two other individuals.
- (2) Cases in which it was determined that the information applied to a person covered by Title VI, but that a preliminary investigation was not warranted:
 - 1. Allegations in the House Judiciary Committee Report concerning the EPA investigation, other than those against Theodore Olson, Carol Dinkins and Edward Schmults

- 3 -

2. Space Shuttle allegations; allegations of White House interference with investigation of Challenger explosion
 3. CIA/Contra training manual (also, no evidence of involvement of an individual covered by the Act)
 4. Mining of Nicaraguan harbor (also, no evidence of involvement of an individual covered by the Act)
 5. Contra aid allegations received in 1984 (also, no evidence of involvement of an individual covered by the Act)
 6. President Carter briefing book inquiry
 7. Allegations of Gift Fund misuse and improper personnel actions by Ambassador to Switzerland Faith Ryan Whittlesey
 8. This determination was also made with regard to allegations in thirteen other matters.
- (3) Cases in which it was determined that a preliminary investigation was warranted:
1. Counsellor to the President Edwin Meese III
 2. Former Assistant Attorney General Theodore Olson
 3. Former Deputy Attorney General Edward Schmults
 4. Former Deputy Attorney General Carol Dinkins
 5. Former Chief of Staff and Assistant to the President Michael Deaver
 6. Obstruction of investigation allegations against Ambassador to Switzerland Faith Ryan Whittlesey
 7. Iran/Contra Allegations
 8. Former Assistant to the President Franklyn ("Lyn") Nofziger

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9. This determination was also made with regard to two additional matters.
- (4) Cases in which a memorandum was filed with the Independent Counsel Division of the Court of Appeals for the D.C. Circuit ("Court") concluding no further investigation or prosecution was warranted and no independent counsel was needed:
1. Former Deputy Attorney General Edward Schmults
 2. Former Deputy Attorney General Carol Dinkins
 3. Obstruction of investigation allegations against Ambassador to Switzerland Faith Ryan Whittlesey
- (5) Cases in which an application was filed with the Court for the appointment of an independent counsel:
1. Former White House Chief of Staff and Assistant to the President Michael Deaver
 2. Former Assistant Attorney General Theodore Olson
 3. Iran/Contra Allegations
 4. Counsellor to the President Edwin Meese III
 5. Former Assistant to the President Franklyn ("Lyn") Nofziger
 6. Applications were filed in two additional matters.
- (6) Cases from which the Attorney General recused himself:
1. Former White House Chief of Staff and Assistant to the President Michael Deaver
 2. Former Assistant to the President Franklyn ("Lyn") Nofziger
 3. The Attorney General recused himself in one additional matter.

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2. Departmental Procedures

The handling of allegations under the Act: Information implicating the Independent Counsel provisions of the Ethics in Government Act comes to the attention of the Department in a number of ways; the media, referrals from Congress, information developed in other criminal investigations, and allegations from citizens. Matters potentially implicating the Act are normally immediately referred to the Public Integrity Section, an office within the Criminal Division of the Department, for preliminary review and handling by career prosecutors. To ensure that information concerning covered individuals is routed to the Department for handling as soon as possible, the U.S. Attorneys, the FBI and other federal law enforcement agencies have all been advised of the provisions of the Act, and are periodically reminded, through training sessions and advisory memoranda, of the obligation to promptly provide notice to the Department of any information potentially implicating individuals covered by the Act. In most cases, this procedure has worked well, and the Department has been notified soon after the development of the information.

Initial review of allegations is normally handled by the Public Integrity Section. The Section conducts a legal and factual analysis and provides advice concerning how the allegation ought to be handled. The level varies at which the final decision is made concerning any given question in any given independent counsel matter; for example, a decision that no preliminary investigation is necessary because the allegation does not suggest that a federal crime was committed or that the subject of the allegation is clearly not covered by the Act might be made by the Chief of the Public Integrity Section, while a decision that an independent counsel should be sought would always be made by the Attorney General himself, unless he has recused himself.

A typical independent counsel matter resulting in the appointment of an independent counsel would be handled as follows: An allegation received by the Department is referred to the Public Integrity Section, which initially confirms that the allegation concerns an individual covered by the provisions of the Act. An assessment is made by the Section as to whether further investigation of the matter is warranted, and its recommendation on that point is forwarded to the Assistant Attorney General for the Criminal Division, who advises the Attorney General of the matter and receives his decision as to how to proceed. Following an appropriate preliminary investigation, which is usually conducted by the Public Integrity Section with the assistance of the FBI, the Section prepares a

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recommendation to the Assistant Attorney General as to whether an independent counsel should be appointed. The Assistant Attorney General then makes a recommendation to the Attorney General, who consults with such other officials of the Department as he deems appropriate. The Attorney General makes the final decision, and signs the documents to be filed with the special division of the court. Of course, each formal step as described may or may not be necessary or appropriate in a given case, depending on the circumstances, but in general the above description accurately portrays the routine handling of independent counsel matters.

Requests for expanded jurisdiction: Requests from an independent counsel for additional prosecutorial jurisdiction are addressed to the Attorney General, and decisions concerning such requests are made by him. To the extent that factual or legal analysis might be necessary to assist him in reaching such a decision, the Office of Legal Counsel or the Public Integrity Section would in most situations be called upon for assistance.

Recusal of the Attorney General: Decisions concerning whether the Attorney General should recuse himself from his normal decisionmaking role under the Act are made by the Attorney General personally, since the reasons for such recusal would be matters within his personal knowledge, such as a significant personal relationship with the subject of the allegations, significant personal knowledge concerning the events in issue, or a personal or financial stake in the outcome of the matter.

3. The 90-Day Period

Under the Department's interpretation of the Act, the Act is triggered and the 90-day period for the preliminary investigation begins to run when the Attorney General personally determines that information received by the Department of Justice warrants further investigation or prosecution. Information developed by a U.S. Attorney's Office in the course of an investigation does not initiate the running of the time period until that information is communicated to the Attorney General.

In most cases handled to date under the Act, the decision to initiate a preliminary investigation has been made immediately upon receipt of information sufficient to trigger the Act, since further investigation was clearly necessary. In the EPA-Judiciary Committee Referral matter, however, the massive report of the House Judiciary Committee had to be read and analyzed, covered individuals identified, and the quality of the allegations and evidence against each of those individuals assessed before a decision could be made as to whether a preliminary investigation was warranted. In that matter, there was a brief delay of approximately one month after the receipt of

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the information before a determination could be made that indeed a preliminary investigation of three individuals was warranted.

Once the decision has been made to proceed with a preliminary investigation, the Public Integrity Section is charged with supervising or coordinating the investigation and preparing the necessary paperwork to conclude the matter. As a result, it is the responsibility of the Section to monitor the 90-day period and ensure that the necessary court-filing is made within that time frame.

The length of the preliminary investigation in each of those cases in which a filing has been made with the special division of the court is set out below:

- b. (4) 1. Former Deputy Attorney General Edward Schmults - 90 days
- 2. Former Deputy Attorney General Carol Dinkins - 90 days
- 3. Ambassador to Switzerland Faith Whittlesey - 36 days
- b. (5) 1. Former White House Chief of Staff and Assistant to the President Michael Deaver - 10 days
- 2. Former Assistant Attorney General Theodore Olson - 90 days
- 3. Iran/Contra allegations - approximately 9 days
- 4. Attorney General Edwin Meese III - 12 days
- 5. Former Assistant to the President Franklyn ("Lyn") Nofziger - 60 days
- 6. In a fifth matter, the preliminary investigation lasted 86 days, and in a sixth, 90 days.

4. Prosecutorial Jurisdiction

a. The specific answer to the question you ask relates to matters under active investigation by independent counsels, and thus cannot be answered at this time. However, as a general matter, the Attorney General would seriously consider any request for expanded jurisdiction of an independent counsel. If persuaded that the requested jurisdiction is related to the inquiry being made by the independent counsel, that pursuing the allegation would not be contrary to the established policies of the

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Department, and that referring the matter would not disrupt ongoing investigations being conducted by the Department, he would in all likelihood grant the request.

b. After his appointment to investigate the Iran weapons transfer and Contra funding allegations, Independent Counsel Lawrence Walsh met with representatives of the Department to sort out jurisdiction over numerous investigations generally related to the subject of his investigation. In every respect, the Department has cooperated with Mr. Walsh to assist him in his inquiry. With regard to other requests from independent counsels concerning their jurisdiction, again, the specific answer to the question asked relates to matters under investigation by independent counsels and cannot be answered at this time.

With respect to your request for access to Departmental documents, I believe that we can respond to any specific questions you have about Departmental policies or practices under the Independent Counsel provisions without necessitating a general review of sensitive criminal files. However, if there are particular documents you need in order to conduct your review, I would be happy to discuss them with you, and I am sure that a procedure can be worked out to accommodate your needs. Of course, with regard to active cases under the jurisdiction of independent counsels, we will consult with them concerning the sharing of documents and information.

The Department anticipates submitting proposals for congressional consideration in the course of your review of the Act, and looks forward to working closely with you and other members of your Subcommittee.

Sincerely,

/s/
John R. Bolton
Assistant Attorney General

TAB B

United States Senate

COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-4250

February 12, 1987

The Honorable John R. Bolton
Assistant Attorney General
Department of Justice
Constitution Avenue and Tenth Street, N.W.
Room 1603
Washington, D.C. 20530

Dear Mr. Bolton:

As the Senate subcommittee with jurisdiction over Title VI of the Ethics in Government Act, governing the appointment, authority and duties of the independent counsel 28 U.S.C. 591-98, the Subcommittee on Oversight of Government Management is engaged in a comprehensive review of Title VI for purposes of its reauthorization and possible amendment. Since the last reauthorization in 1982, several areas of concern have developed over the implementation of the statute. As you may already be aware, we have made a request to your office for information regarding all cases handled by the Department under Title VI since 1982.

It has come to our attention that the Department's Office of Professional Responsibility (OPR), headed by Michael E. Shaheen, Jr., has been involved in past and current independent counsel cases. A representative of Mr. Shaheen's office has directed us to your office in our request for certain information concerning OPR's role.

Specifically, we request a copy of a four-page memorandum, dated July 19, 1982, and signed by Mr. Shaheen, stating the conclusions of the Office of Professional Responsibility relating to an inquiry involving William French Smith, then Attorney General of the United States.

Additionally, we would appreciate being informed of the past or current involvement of the Office of Professional Responsibility in inquiries concerning Attorney General Edwin Meese as they relate to the recently concluded investigation of U.S. Ambassador to Switzerland Faith Ryan Whittlesey and

The Honorable John R. Bolton
February 12, 1987
Page Two

the current investigation into the Iran/arms sales/contra controversy being headed by Independent Counsel Lawrence Walsh.

Please provide this information by Thursday, February 26, 1987. Any requests for additional information should be directed to Jack Mitchell of the Subcommittee staff at 224-3682.

Sincerely,

A handwritten signature in cursive script that reads "Carl Levin".

Carl Levin, Chairman
Subcommittee on Oversight of
Government Management

CL:jhm



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JAN 15 1987

Honorable Carl Levin, Chairman
Subcommittee on Oversight of
Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Senator Levin:

This is in response to your February 12, 1987 letter requesting a copy of a particular memorandum by the Office of Professional Responsibility (OPR) relating to an inquiry involving former Attorney General William French Smith. A copy of that memorandum is enclosed.

You have also asked to be informed of the past or current involvement of OPR in inquiries concerning Attorney General Meese as they relate to the investigation of Ambassador Faith Ryan Whittlesey, and to the ongoing investigation by Independent Counsel Lawrence Walsh into the "Iran/arms sale/contra" matter. As to the Ambassador Whittlesey matter, OPR's only involvement consisted of referring an inquiry from the Office of Government Ethics to the Public Integrity Section of the Criminal Division about whether the Attorney General had considered recusing himself from the decision not to apply for the appointment of an Independent Counsel. With regard to the Iran-Contra affair, OPR was involved preliminarily in an inquiry which began on December 15, 1986, into one aspect of that matter, but it suspended its involvement when the Independent Counsel assumed jurisdiction of that inquiry.

We are available if you have any questions, and we appreciate your interest.

Sincerely,

John R. Bolton
Assistant Attorney General

Enclosure



U.S. Department of Justice

Office of Professional Responsibility

JUL 19 1982

Washington, D.C. 20530

MEMORANDUM TO: Rex E. Lee
Solicitor General

FROM: Michael E. Shaheen, Jr. *ME Shaheen*
Counsel
Office of Professional Responsibility

SUBJECT: The Attorney General's Investments
in Yale-Quay Energy Partners and
Blackhawk Energy Partners, Ltd.

This Office recently concluded a review of the Attorney General's participation in two investment programs, known as the Yale-Quay Energy Partners (Yale-Quay) and Blackhawk Energy Partners, Ltd. (Blackhawk), which have as their ultimate goal the production of domestic oil and gas. Both are limited partnerships. Both, when they were created, offered investors the benefit of shielding from taxation more ordinary income than the original investment. ^{1/} In one of the two instances, the Attorney General elected to participate subsequent to assuming office: he made his initial investment in Yale-Quay on November 27, 1981. The first Blackhawk payment was made on December 17, 1980, a few days after his proposed appointment was publicly announced. The Attorney General made both of these investments with the advice of tax counsel--Meserve, Mumper, and Hughes of Los Angeles--and outside the qualified diversified trust he created to manage the large majority of his assets. Because the Attorney General made his initial investment in Blackhawk prior to his appointment, this Office concluded that it was not covered by the Standards of Conduct. Therefore, the remainder of this report addresses only the Yale-Quay investment.

^{1/} This benefit is accomplished through the calculation of "intangible drilling costs" and through a commitment by the partnership to pay to the lessor of the tracts where drilling is to occur a stated minimum royalty payment during the term of the lease regardless of the success of exploration activities. Both of these items are treated as front-end costs of doing business and, hence, under the accrual method of accounting, they are also treated as immediately deductible. The Attorney General invested \$25,000 in Blackhawk, half of which he paid on December 17, 1980 and half in March 1981. Based on that investment, the Attorney General claimed tax deductions of \$51,000 in 1980 and \$25,800 in 1981. To participate as a limited partner in Yale-Quay, the Attorney General paid \$16,500 on November 27, 1981 and the same amount on March 30, 1982. His tax return for 1981 claimed a deduction of \$66,000 for the first payment and, in 1982, he claimed \$33,000.

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Following press accounts calling into question the legality^{2/} and propriety of these investments, this Office received a complaint alleging that the Attorney General may have violated 28 C.F.R. 545.735-11, which prohibits a Departmental employee from investing:

(a) In enterprises which it is reasonable to believe will be involved in decisions to be made by him, (b) on the basis of information which comes to him by reason of his status as a Department of Justice employee and which has not become part of the body of public information or (c) which are reasonably likely to create any conflict in the proper discharge of his official duties.

The applicable provision for purposes of this inquiry is part (c). After we had received this complaint, the Attorney General announced on May 28, 1982, that he would forego all deductions deriving from Blackhawk and Yale-Quay which "will exceed the actual cash invested." Further, he stated that: "I will recuse myself from any decisions involving the tax treatment of investments in energy drilling programs. Of course, I will also continue my existing policy of disqualifying myself from the resolution of any issues that might arguably give rise to the appearance of a conflict."

Except insofar as it exonerates him of criminal misconduct, the scope of this inquiry does not comprehend passing on the substantive tax aspects of the Attorney General's investments.

^{2/} A brief preliminary inquiry determined that the Attorney General suffered no potential criminal liability as a result of these investments. Roughly stated, the Department pursues criminally only those "tax shelters" which are fraudulent in nature, e.g., those created solely to achieve tax savings, those entered into with the specific knowledge that the economic asset underlying the original investment is grossly and intentionally overvalued or non-existent, and those which involve the backdating or forging of documents so as to achieve impermissible deductions. No such allegations have been made against Yale-Quay or Blackhawk. For that reason, we severed this matter from inclusion with the allegations involving the Jorgensen severance payment, which was referred to the Criminal Division for the preliminary investigation prescribed by the provisions of the Special Prosecutor Act.

Our inquiry can be resolved without reaching the merits of the tax questions raised by the structure of Yale-Quay. Put simply, the operative question under the Department's Standards of Conduct is whether the Attorney General knew or should have known that this investment--whatever the ultimate determination of its legitimacy as a shield for income--would create a conflict with his official duties. If the answer to this question is affirmative, then a second question is presented for consideration--whether his voluntary relinquishment of both the claimed and anticipated tax benefits flowing from this investment cures the problem created by his participation.

The first question must be answered in the affirmative. Among the Attorney General's duties is the supervision of the Tax Division. That Division's chief responsibility is to represent the Internal Revenue Service in the courts of the United States. In at least one revenue ruling the Internal Revenue Service objected to the very method employed by Yale-Quay to calculate tax benefits. See Revenue Ruling 80-70, 1980-1 Cumulative Bulletin 104. The Attorney General received notice of the Service's position in the tax opinion prepared by Meserve, Mumper, and Hughes for Yale-Quay. By electing to go forward with the investment despite the ruling, the Attorney General breached the Standards of Conduct provision which proscribes investments by a Department employee "which are reasonably likely to create any conflict in the proper discharge of his official duties." 28 C.F.R. §45.735-11(c).

The Meserve, Mumper, and Hughes opinion carefully lays out the Service's position. It goes on to point out that the ruling at issue was later implicitly called into question by two decisions of the United States Court of Appeals for the Ninth Circuit.^{3/} Those

^{3/} See Van Raden v. Commissioner, ___ F.2d ___, 81-2 USTC ¶9547 (9th Cir. July 31, 1981); Zaninovich v. Commissioner, 616 F.2d 429 (9th Cir. 1980); rev'ing Commissioner v. Zaninovich, 69 T.C. 605 (1978). In Zaninovich, the Tax Court disallowed deductions claimed by a lessee for rental fees over a twelve-month period which he paid in full in the year he claimed the deduction, but which were attributable to two separate taxable years. The Tax Court held that the rental payments could only be deducted ratably over the period of the lease. Reasoning that the Tax Court's holding compelled the position that "[r]entals may be deducted as such only for the year or years to which they are applied," the Service ruled in Revenue Ruling 80-70 that, regardless of whether the taxpayer used the cash receipts and disbursements method of accounting or the accrual method of accounting, an advanced mineral royalty resulting from a minimum royalty provision which covers a

(Footnote continued on next page.)

decisions led Meserve, Mumper, and Hughes to the "opinion that Rev. Rul. 80-70 is incorrect." That opinion, upon which the Attorney General reasonably relied in making his investments, does not alter our conclusion. As the nation's chief law enforcement officer, the Attorney General has himself acknowledged that he does not stand in the shoes of the average investor. Moreover, he acknowledged in his May 28th statement that a substantial public trust is reposed in his office and that he is to be measured against the highest standard. The existence of Revenue Ruling 80-70, the validity of which the Service continues to assert, dictates our finding that the Attorney General should not have invested in Yale-Quay.

The Attorney General subsequently took voluntary steps sufficient in our view to cure the substance of this regulatory violation. By electing to forego all tax benefits flowing from Yale-Quay and Blackhawk which exceed his actual capital outlay, and by recusing himself from any decisions involving the tax treatment of energy drilling investments, the Attorney General has resolved the conflict which would otherwise have existed between his private investments and his public responsibilities. Accordingly, no further action need be taken regarding these investments, and we recommend that you consider this matter closed.

3/ (Continued.) twelve-month period extending beyond the taxable year is not fully deductible during that taxable year. "Only that portion of an advanced minimum royalty paid or involved that is properly attributable to the current taxable year is deductible...."

Meserve, Mumper argues that the Ninth Circuit's reversal of the Tax Court in Zaninovich leaves the ruling, building as it does on the validity of the Tax Court's position to reach the broader questions presented by Yale-Quay, without a logical or a persuasive basis. In Zaninovich the Ninth Circuit adopted "the 'one-year' rule, 616 F.2d at 632, permitting the taxpayer to deduct in full his payment of rental fees for a twelve-month period even though the period extended into the next taxable year. That holding was reaffirmed in Van Raden.

STATEMENT OF ARCHIBALD COX
BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF
THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

Mr. Chairman, Mr. Ranking Member, and Members of the Committee:

I appreciate this opportunity to appear on behalf of Common Cause before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs to present our views on Title VI, the Independent Counsel provisions, of the Ethics in Government Act ("the Act"), 28 U.S.C. 591-98. I am Chairman of Common Cause, a citizens' organization of 275,000 members. I am also Carl M. Loeb University Professor Emeritus at Harvard University and a Visiting Professor of Law at Boston University. I have served in the U.S. Department of Justice as a young lawyer, as Special Watergate Prosecutor, and as Solicitor General of the United States.

Common Cause strongly supports the reenactment of Title VI. The Ethics in Government Act of 1978 is the result of a comprehensive congressional effort to safeguard the integrity of the governmental process. The Independent Counsel provisions are essential to preserving public confidence in the fair and ethical behavior of public officials.

The Ethics Act, and particularly its Independent Counsel provisions, flowed directly from the Watergate scandals, which generated an extraordinary crisis of public confidence in the integrity of our government. The Senate Watergate investigation that began in the fall of 1972 and culminated in President Nixon's resignation nearly two years later exposed not only gross

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misconduct by high government officials, but also impropriety and favoritism in the Justice Department's investigation of that misconduct.

A number of committees in both the House and the Senate held hearings to consider a variety of proposals designed to alleviate abuses of prosecutorial power revealed by Watergate. Congress recognized at the time the law was enacted (see, e.g. H.Rep. 95-1037, 95th Cong., 2d Sess. 2 (1978) and then reenacted, see, e.g. S.Rep. 97-496, 97th Cong., 2d Sess. 4 (1982)) that the problems revealed by the Watergate scandal were neither unique to nor confined to that scandal or that Administration. As the House Judiciary Committee noted in its report recommending the law's enactment:

"The Attorney General is at the same time the chief Federal law enforcement official and a Presidential appointee who is a key member of the President's cabinet. Cases involving possible wrongdoing by high-level executive branch officials, therefore, present a fundamental conflict of interest." H. Rep. 95-1307, supra at 2.

Because of this conflict of interest there can be no assurance of both fairness and the appearance of fairness if the Attorney General and his subordinates are left to deal with allegations of wrongdoing on the part of high executive officials. In order to solve this problem Congress provided the present mechanism for the appointment of temporary Independent Counsel with the powers of a prosecutor but without supervision by the President or the Attorney General. 28 U.S.C. 591-598. The mechanism ensures that prosecutorial decisions involving the President, the Vice-President, and senior presidential aides are made on the merits and not out of favoritism toward a powerful

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figure. By assuring the public that a thorough, impartial investigation will occur, the mechanism also benefits the innocent official by legitimizing a decision to refrain from prosecution.

The Independent Counsel provisions of the Act are scheduled to expire if not reenacted by January 1988. Common Cause strongly urges reenactment with strengthening amendments.

In Part I, below, we explain why the Independent Counsel provisions are, and their reenactment would be, entirely constitutional.

In Part II we elaborate our reasons for urging reenactment.

Part III discusses two instances in which the available information gives strong reason to believe that the Attorney General has failed to apply Title VI, particularly Section 592, in accordance with the manifest intent of Congress. The risk of continued misapplication can be reduced, we submit, by a Subcommittee Report pointing out the errors and calling upon the Attorney General to avoid repetition.

Part IV recommends that the provision of Title VI relating to expansion of the jurisdiction of an existing Independent Counsel should be clarified by granting the division of the court explicit power to extend the jurisdiction of Independent Counsel upon his request and without the concurrence of the Attorney General.

Part V suggests that the powers and duties of an Independent Counsel be expanded by an amendment directing Independent Counsel to call to the attention of the Office of Government Ethics and the appropriate officials in any department or agency any information developed in the course of his investigation that gives reason to believe that an individual may have committed a

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violation of ethical standards prescribed for government employees not deserving criminal prosecution.

Part VI urges the oversight powers of appropriate Congressional committees be further implemented by an amendment requiring the Attorney General to make closed files on cases handled under Title VI available to an appropriate Congressional committee on the same terms as such files are available in other criminal investigations or prosecutions.

Part VII suggests that the Committee Report call the attention of the court to the need to make public the pendency of questions of law requiring its determination, together with sufficient disclosable information to enable interested parties to file briefs amici curiae.

I. TITLE VI OF THE ETHICS IN GOVERNMENT ACT, 28 U.S.C. 591-8, IS CONSTITUTIONAL

It is my considered opinion that Title VI of the Ethics in Government Act is constitutional. Congress had ample constitutional authority to enact Title VI, and has ample power to renew it.

1. The power of Congress to create the office and provide for the appointment of Independent Counsel by a court of the United States is beyond reasonable dispute. Virtually all government departments, offices, and agencies are created by act of Congress. Equally plainly the post of Independent Counsel is an "inferior office" in the constitutional sense. Article II, section 2, cl. 2 explicitly provides that --

Congress may by Law vest the Appointment of such inferior officers, as they think proper, . . . in the Courts of Law

The Constitution puts no restriction upon this express grant. The Supreme Court has indicated that there is no implied restriction, possibly excepting instances in which court appointment of certain officers is incongruous with judicial duties. Ex Parte Siebold, 100 U.S. 371 (1879). There is no incongruity in calling upon a court to appoint prosecutors, who, unlike a military officer or diplomat, are officers of the court, counsel to the grand jury and subject to the disciplinary power of the court. See U.S. v. Solomon, 216 F.Supp 835 (SDNY, 1963) (upholding 28 U.S.C. Sec. 546, empowering courts to fill vacancies in the office of U.S. Attorney). Courts often appoint counsel to prosecute criminal contempts.

2. Congress also has power to make Independent Counsel entrusted with the investigation and possible prosecution of high-level Presidential aides truly independent of the day-to-day supervision of the President or his appointee, the Attorney General. In Kendall v. U.S., 37 U.S. (12 Pet.) 524 (1837), the Supreme Court described as "alarming" the idea that the Congress "cannot impose upon any Executive Officer any duty they may think proper . . . ; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the discretion of the President." In Myers v. U.S., 272 U.S. 52 (1926), the Court implied that Congress may so specifically commit duties to the discretion of a particular officer as to limit the power of the President to revise the officer's interpretation of his duties in the first instance. In Humphrey's Executor v. U.S., 295 U.S. 602 (1935) and Wiener v. U.S., 357 U.S. 349 (1958), the Court indicated that Congress may ensure independence from the

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day-to-day supervision of the President when the tasks of the officer require "freedom from Executive interference," when the office "must, from the very nature of its duties, act with entire impartiality" and "not be open to the suspicion of partisan direction."

The necessity of absolute freedom from "suspicion of partisan direction" exists in every case in which the statute authorizes the appointment of Independent Counsel. Independent Counsel may be appointed only when the officers or other individuals against whom criminal charges have been made are or have been so close to the President and/or the Attorney General as to give rise to the appearance, if not the sharp actuality, of a conflict of interest. Because day-to-day supervision by the President or Attorney General would reintroduce that conflict of interest, the Independent Counsel who conducts an investigation and prosecution must be independent of such control in order that he may "act with entire impartiality" and "not be open to the suspicion of partisan direction."

The cases sometimes cited to support the argument that the statutory independence of Independent Counsel trespasses upon the executive powers of the President under Article II are readily distinguishable. Myers v. U.S., 272 U.S. 52 (1926) (removal subject to approval by Senate); Buckley v. Valeo, 424 U.S. 1 (1976) (appointment by Congressional officials); INS v. Chadha, 462 U.S. 919 (1983) (one House veto); and Bowsher v. Synar, 106 S.Ct. 3181 (1986) (delegation to official controlled by Congress) all involved measures by which Congress attempted to enlarge its power by intermingling its operations with those constitutionally

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assigned to the Executive branch. Title VI does not inject Congress, a congressional instrument, or an officer subject to removal by Congress into Executive functions. Title VI does not enlarge congressional authority. The sole effect of the limited independence given to Independent Counsel is to bar the President and Attorney General from day-to-day control over an officer charged with investigating the President's closest aides.

3. Congress also has ample power to forbid Executive removal of Independent Counsel without good cause. Humphrey's Executor v. U.S., 295 U.S. 602 (1935), and Weiner v. U.S., 357 U.S. 349 (1958), squarely upholds the power of Congress to forbid discretionary removal of officers whose functions call for a significant measure of independence from Presidential control. The functions of Independent Counsel require that measure of independence, as shown above, in order to assure the public of the full and fair investigation and prosecution, if necessary, of alleged wrongdoing high in the Executive Branch.

There is no merit in the argument that Title VI unconstitutionally seeks to vest in a court the incongruous power to control prosecutorial decisions. The scope of the office to which Independent Counsel will be appointed is adequately defined by Section 591; it is the office of investigating whether an identified individual falling into one of the categories specifically defined by Section 591(b) has committed a violation of one or more federal criminal laws other than a petty offense. The initial definition of jurisdiction need do little more than refer to the specific individual and relevant group of crimes. The court is required only to apply the general concept of the

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statute to particular fact -- a familiar judicial role. The appointment of an attorney to prosecute an alleged criminal is essentially similar.

It has also been argued against our view that expansion of the jurisdiction of Independent Counsel upon his request would vest non-judicial powers in the court. But such action would involve only the removal of limitations in the original jurisdiction that events have shown to be artificial. The court would still be applying the definitions and policy of Section 591. The expansion would extend only to persons and events discovered to have been acting in association with or related to the initially identified individual and events.

There is likewise no merit to the rhetorical question asking, if the power to appoint counsel carries with it power to expand an Independent Counsel's jurisdiction, why may not the same be said of virtually any other prosecutorial decision that independent counsel may make? The same may not be said because Title VI does not give the power and because reading it into the statute would run contrary to ancient and familiar precepts of our law. Controlling traditional prosecutorial decision is utterly different from detailing in practical operating terms the scope of an office already defined in principle by the Congress (Section 591).

The points just outlined are elaborated in the brief amicus curiae filed by Common Cause in response to the constitutional challenges raised by Lt. Col. Oliver North and Michael Deaver. The brief is signed by Paul A. Freund, probably the leading constitutional scholar now living, Philip B. Heymann, a former

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Assistant Attorney General in charge of the Criminal Division, Lawrence H. Tribe, author of a leading constitutional law treatise, Donald J. Simon, Cass Sunstein, and myself. I ask that it be made part of the record before the Subcommittee as a more complete exposition of our submission that Title VI is constitutional.

II. TITLE VI OF THE ETHICS IN GOVERNMENT ACT SHOULD BE REENACTED WITHOUT LIMITATION OF TIME

Effective government in a free society depends upon public confidence that all officials are governed by law and, upon violation, are subject to the same pains and penalties as other citizens. That confidence can be preserved in the face of credible charges of wrongdoing high in the Executive Branch only by providing for a vigorous, impartial, and fair-minded investigation by a prosecutor not linked to the President or his principal aides by personal, political, or official association. A special mechanism is required in such cases because the normal law enforcement officials, the Attorney General and his subordinates in the Department of Justice, are inescapably so closely linked to the President and his administration by political and often personal ties as to create a severe conflict of interest, even the appearance of which would erode public confidence in the integrity of a Department of Justice investigation. The Teapot Dome and Watergate scandals amply demonstrated the need. Since 1978 Title VI has provided the necessary machinery, but it will expire in January 1988.

Title VI should be reenacted as permanent legislation because events demonstrate the need for such machinery. The need for

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detached, impartial investigation of the sale of arms to Iran and provision of unauthorized aid to the Contras would be sufficient illustration. In fact, it has been necessary to appoint special prosecutors or independent counsel at least six times during the past six years to investigate charges of criminal misconduct against high officials.

The procedure established by Title VI is preferable to "a system in which the Department of Justice hires individuals to conduct investigations and prosecutions of high level officials"¹ for four reasons:

First, the conflict of interest that inevitably casts doubt upon investigation and prosecution by the Attorney General also precludes leaving the decision to appoint a special prosecutor to his discretion.

Second, there is too much danger that public misgivings resulting from the same conflict of interest would lessen confidence in the detachment and impartiality of a special prosecutor selected by the Attorney General. Judicial selection builds such confidence.

Third, it is difficult to secure complete independence for a special prosecutor appointed by the Attorney General. He can always be removed.

Fourth, it is desirable to have a court determine whether and when to release to the public reports and other relevant papers.

¹Question 1, Letter from Subcommittee Chairman and Ranking Member, February 27, 1987.

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III. THE SUBCOMMITTEE SHOULD REQUIRE THE ATTORNEY GENERAL TO CEASE MISAPPLYING THE STATUTORY STANDARDS RELATING TO PRELIMINARY INVESTIGATION AND APPOINTMENT OF INDEPENDENT COUNSEL

The Subcommittee and the Congress faced a difficult problem in drafting the provisions of Title VI governing the disposition of charges against a high-level official prior to appointment of Independent Counsel. On the one hand, it was plain that the mere receipt of any charge of wrongdoing should not trigger the appointment of Independent Counsel. On the other hand, the inherent actual or apparent conflict of interest required exclusion of the Attorney General and his subordinates from any decisions that might be or even plausibly seem to be subject to influence by personal or political interest. Section 592 attempts to solve the problem in two stages.

First, when the Attorney General receives information suggesting that a person covered by Title VI has engaged in covered misconduct, the Attorney General is required to determine whether "grounds to investigate exist."

Second, if the Attorney General proceeds to a preliminary investigation, at its conclusion he is to determine whether further investigation and prosecution is warranted. If the Attorney General so determines, he must apply to the court for appointment of an Independent Counsel. If he determines that further investigation is not warranted, he must notify the court and furnish a summary of the results of the preliminary investigation and the reasons for not proceeding further.

Although complete information is not available, the notifications filed by the Attorney General regarding Faith Ryan Whittlesey, Edward Schmults and Carol Dinkins strongly indicate

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that both the first and second standard have been seriously misapplied.

A. The Attorney General has misapplied the statutory standard for initiating a preliminary investigation.

When the Attorney General receives information suggesting that a person covered by Title VI has engaged in covered misconduct, the Attorney General is then required by Section 592(a)(1) to determine "whether grounds to investigate exist." Both the words of Section 592(a) and the legislative history make plain that at this stage the Attorney General is to consider only two factors:

- the degree of specificity of the evidence he received, and
- the credibility of the source of the information.

Moreover, the Senate Committee Report clearly states that the allegation need not include every element of the crime: "the accuser would not be required to expressly allege that the act was a bribe or show that all legal elements of a crime exist." (pp. 12-13)

If the information received from a credible source is sufficiently specific, then the Attorney General "shall conduct a "preliminary investigation." The mandatory obligation to move to a preliminary investigation is highly important to the success of Title VI because every preliminary investigation must end either in an application for judicial appointment of Independent Counsel (Section 592(c)) or in the filing in court of a notification summarizing the information received and the results of the preliminary investigation (Section 592(b)). If the Attorney General ignores the requirement for a preliminary investigation, conducts some other form of inquiry, and then decides on the basis

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of other factors not to apply for the appointment of Independent Counsel, no notification is filed under Section 592(b) and the only sure opportunity for oversight is lost.

The notification filed by the Attorney General in the case of Faith Ryan Whittlesey reveals that on an earlier occasion the Attorney General failed to follow the statutory mandate. In the fall of 1986 the Attorney General received information that Ambassador Whittlesey may have received money in violation of the gratuity statute and may have used the Ambassador's gift fund for unauthorized purposes. An inquiry into the allegations was conducted by the Department of Justice in conjunction with the State Department Inspector General's Office. The inquiry produced specific and credible evidence that money donated to the gift fund of the Ambassador had been used for unauthorized purposes (pp. 3-7 of the Notification), that the Ambassador appointed an official to her staff whose family shortly thereafter made a \$5,000 contribution to the Ambassador's gift fund (pp. 15-17), and that donors to the Ambassador's gift fund had requested that the Ambassador take official action on their behalf, and that she had taken such action (pp. 8-12). Not only was the information credible, it was unchallenged. Despite the time and detail involved in what he himself termed a "thorough inquiry," the Attorney General determined to close the inquiry without notifying the court of his decision not to request appointment of Independent Counsel, and thus without explaining the reasons for his decision.

That plan for closing was in clear conflict with the statutory mandate contemplating a preliminary investigation

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followed by notification whenever specific information has been received from a credible source. The Attorney General had the specific facts indicating a possible criminal offense from a credible source, but he was not content to follow the statute. He went on to find that there was no evidence of intent to violate the gratuity (18 U.S.C. 201(g)) and State Department gift statutes (22 U.S.C. 2697). Not only are decisions involving inferences of intent those from which the Attorney General should stand back, for reasons indicated below, but the Senate Committee Report on the 1982 amendments explicitly states that the specific information required to trigger a preliminary investigation does not include information on every element of a crime.

Receipt of additional information caused the Attorney General to conduct a preliminary investigation into a related matter. The notification in that instance revealed the prior "thorough inquiry" and thus the facts did become known. Nevertheless, it is important that the Subcommittee call attention to the Attorney General's misapplication of the preliminary investigation standard in order to prevent undermining one of the few sure mechanisms for accountability at this stage that the Act provides.

B. The Attorney General has misapplied the statutory standard for whether to request the court to appoint Independent Counsel.

When the Attorney General conducts a preliminary investigation, he must determine upon its completion whether further investigation and prosecution is warranted. In making that determination he is to comply with the written or other

established policies of the Department of Justice with respect to the enforcement of criminal laws.

Both the statutory language and the legislative history show that the Attorney General is to perform no more than a screening process. The present standard, quoted above, was adopted in 1981 in order to make it plain that Independent Counsel need not be appointed when a clear-cut, well-established policy would preclude prosecution if the individual subject of a preliminary investigation were not an official high in the Executive Branch. But it was never the intent to authorize the Attorney General to make discretionary judgments about the weight of the evidence or the degree of culpability in the particular case. The Senate Report states:

In his report to the court, the Attorney General must substantiate this practice with case law, opinions of the U.S. Attorney for the district in which the violation was alleged to have occurred, written prosecutorial guidelines, or other evidence that no prosecution would be brought.

This Committee strongly stresses that the Attorney General must make this determination only in those clear cases in which there is an established, demonstrable policy not to prosecute. Any case in which there is no clear policy against prosecution or any arguably exceptional circumstances are present should be sent to a special prosecutor. (p. 15, emphasis added.)

The Hamilton Jordan case discussed in the 1981 hearings and subsequent reports is a good example of the kind of preliminary investigation in which a "clear policy against prosecution" would make further investigation or prosecution unwarranted. Similarly, if it is indeed a long-established practice of the Department of Justice to refrain from investigating and prosecuting violations of the Neutrality Act, then the Attorney General applied the statutory standard correctly in the instance cited in Question 5

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in the Subcommittee's letter to Archibald Cox dated February 27, 1987.

The purpose and policy of Title VI, backed by the legislative history, make it equally plain that the Attorney General should not exercise in the name of Department policy that kind of final prosecutorial judgment invoked in appraising the weight of the evidence or likelihood of a conviction. Similarly, the Attorney General misapplies the statutory standard if he weighs the relative credibility of the official under suspicion as opposed to other potential witnesses, draws or refuses to draw inferences about the official's "intent," or attempts to determine the individual official's moral culpability.

This distinction was explicitly drawn by the report of the Subcommittee which introduced the "reasonable grounds" standard:

The "reasonable grounds" language would, in the Subcommittee's judgment, strike an appropriate balance between the need to permit the Attorney General to exercise limited discretion in evaluating the results of the preliminary investigation and the need to establish a standard that is not so high that the Attorney General would be making decisions best left to the special prosecutor.

The Subcommittee's proposed standard should not be interpreted as allowing the Attorney General to definitely establish whether or not prosecution is warranted. (p. 49)

The distinction is also implicit in the purposes and policy of Title VI. Title VI rests upon the premise that an Attorney General, whose personal and political interest are involved whenever other individuals high in the same administration are suspected of crime, should be disqualified from making prosecutorial judgments that may be or may seem to be influenced by his personal feelings or political interests. Decisions concerning credibility, motive or intent, the weight of the

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evidence, and the likelihood of persuading a jury are peculiarly susceptible to that kind of influence even when made in attempted good faith. The policy of Title VI requires that in such cases the Attorney General leave the final judgment to Independent Counsel and himself stand aside.

The administration of Title VI in accordance with the statutory standard requires the Attorney General to be alert and sensitive to the danger that a prosecutorial decision may be or appear to be influenced by personal relationships or political concerns. The "reasonable grounds" standard, correctly applied, requires him to ask the court to appoint Independent Counsel unless the question whether to proceed with an investigation or prosecution is so plain that a decision not to proceed further could not be or appear to be affected by personal or political interests.

As we read the notifications in the Whittlesey, Schmults, and Dinkins cases, the Attorney General failed to apply the standard intended by Congress. Our reasons for reaching this conclusion are set out below. We doubt whether any more precise statutory language can be developed, but we suggest that the Subcommittee could clarify the standard and reduce the risk of future misapplication by pointing out the errors.

In the case of Ambassador Whittlesey the Attorney General conducted a preliminary investigation into the charges made by the Deputy Chief of Mission under the Ambassador that the Ambassador had attempted to obstruct the federal investigation just completed into the allegations that she had violated the gratuity (18 U.S.C. 201(g)) and State Department gift statutes (22 U.S.C. 2697). The

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Notification to the court on the Attorney General's preliminary investigation sets forth the conflicting versions of the facts given by the Ambassador and her Deputy Chief of Mission concerning the conduct that was the basis for the allegations and states that "the Department for present purposes resolved the disputed facts in the light least favorable to Ambassador Whittlesey." (p. 27) The Attorney General then determined that reasonable grounds for further investigation did not exist because "a reasonable prosecutor would not seek an indictment on the basis of the results of [his] preliminary investigation." (p. 28) He explained that it would be "unjust" to seek the appointment of an Independent Counsel because "[n]o harm resulted from Ambassador Whittlesey's conduct, which occurred at a time of great personal stress for the Ambassador and concern over perceived efforts to discredit her." (p. 28)

This is a misapplication of the statutory standard for appointment of Independent Counsel. The Attorney General is not authorized to decide whether there should be an indictment based on his findings, but on whether there are reasonable grounds to believe that further investigation would yield findings that could lead to an indictment.

Moreover, the Attorney General's decision appears to be based partly on the sympathy that he believed the Ambassador should be accorded. Reliance on grounds of compassion is precisely the sort of consideration inappropriate for one involved in a conflict of interest. The Attorney General had worked together with the Ambassador in the White House and had been entertained by her in Switzerland. Could anyone in his position, sensitive to conflict

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of interest, be sure that his judgment that compassion was due was wholly uninfluenced by personal, official or political association?

The Attorney General also failed to apply the statutory standard in the Schmults and Dinkins cases. In the Schmults case he determined that although former Deputy Attorney General Edward Schmults had not disclosed withholding documents from the House Judiciary Committee, reasonable grounds for further investigation did not exist because there was "insufficient evidence of criminal intent" (p. 24). In the case of former Assistant Attorney General Carol Dinkins, involving charges that she withheld undisclosed documents from the Judiciary Committee during its investigation and submitted a false or misleading declaration to the court, the Attorney General also found no reasonable grounds for further investigation because evidence was lacking concerning her state of mind (p. 45).

But issues of intent are precisely the kinds of issues on which Title VI contemplates deference to an impartial investigator. No one sensitive to the dangers of acting with a conflict of interest could have full confidence that his decisions on these issues were not affected by the fact that he was making critical prosecutorial judgments on former high-level officials in his own Department. In many cases, moreover, the investigative tools expressly denied the Attorney General -- subpoena power, the power to obtain testimony under oath -- might well provide additional useful evidence on such issues if he allowed an Independent Counsel to proceed.

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IV. THE COURT SHOULD BE GIVEN EXPRESS POWER TO ENLARGE THE EXISTING JURISDICTION OF AN INDEPENDENT COUNSEL UPON HIS REQUEST

The provisions of the Act relating to extension of the jurisdiction of an Independent Counsel should be clarified and strengthened.

Reflection upon the course of criminal investigations makes plain that situations will arise from time to time in which Independent Counsel finds either that the individual under investigation for specified crimes may have committed other related offenses not within his existing jurisdiction or that other individuals not within his jurisdiction may have engaged in criminal misconduct in combination or association with the named individual. In such situations full understanding of the evidence and economy of resources may both require centering further investigation and prosecution under a single head. Consolidation may also be necessary to give a grand jury or trial jury a full understanding of events. Although the facts have not been fully disclosed, such a situation is said to have developed in Independent Counsel's investigation of Theodore Olson, a former Assistant Attorney General.

Title VI in its present form leaves doubt concerning the allocation of power to deal with such situations. Section 592(e) provides:

The Attorney General may ask an independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

Section 594(e) provides that:

An independent counsel may ask the Attorney General or the division of the court to refer matters related to

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the independent counsel's prosecutorial jurisdiction. . . .

Section 593(c) provides:

The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing independent counsel, and such expansion may be in lieu of the appointment of an additional independent counsel.

The relation between these provisions is unclear, particularly in respect to the difference between an expansion of jurisdiction and reference of a new matter related to Independent Counsel's existing jurisdiction. The important question is whether the Attorney General can block any addition that might be described as an expansion of jurisdiction.

Possibly, the term "expansion" is used to describe expansion into unrelated matters and the power to refer covers any related matter even though it is an area into which counsel was not previously authorized to inquire. Possibly the phrase "upon request of the Attorney General," being set off by commas, is not restrictive. Possibly Section 593(c) does not limit the powers of the division of the court. But the words can be read to allow an expansion of jurisdiction only upon request of the Attorney General. So important a question should not be left in doubt.

As pointed out above, situations are bound to arise in which evidence discovered by Independent Counsel makes plain that the original definition of his jurisdiction was narrower than common sense and equal justice have come to require. The Attorney General ought not to hold a veto over the expansion of jurisdiction needed to meet unforeseen developments. The very same personal and political relationships and the ties to the

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President that make it inappropriate for the Attorney General to control the conduct of the investigation and prosecution make it equally inappropriate for the Attorney General finally to control the investigation's scope. The court should therefore be given authority to grant an extension of jurisdiction upon request of Independent Counsel. The court would still have ample authority to determine whether the additional matters really are related to the initial subject and whether justice requires that the request be granted or denied.

This change can most easily be accomplished by amending Section 593(c) to read:

The division of the court upon request of the Attorney General which may be incorporated in an application or upon request of the independent counsel may expand the jurisdiction of an existing independent counsel to include any additional persons or offenses related to matters within such original jurisdiction, and such expansion may be in lieu of the appointment of an additional independent counsel.

- V. THE POWERS AND DUTIES OF INDEPENDENT COUNSEL SHOULD BE INCREASED BY REQUIRING HIM TO REPORT TO THE APPROPRIATE AUTHORITIES ANY EVIDENCE GIVING REASON TO INVESTIGATE THAT AN INDIVIDUAL HAS VIOLATED ETHICS STANDARDS FOR GOVERNMENT OFFICIALS

The authority of Independent Counsel under Title VI is presently limited to the investigation and prosecution of criminal offenses. Title VI does not provide a mechanism for impartially exploring, resolving, and punishing non-criminal offenses, such as violations of civil law, administrative regulations or Standards of Conduct set forth in Executive Orders, even when these issues arise in the course of an Independent Counsel's investigation.

The limitations were recognized by Independent Counsel, Jacob Stein, Esq., in his report of an investigation into charges that Edwin Meese III had engaged in improprieties as Counsellor to the

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President. Mr. Stein found "no basis" for prosecution. Mr. Stein also explicitly refused to say ". . . that the evidence does not substantiate the loose charges of moral turpitude against Mr. Meese" (Independent Counsel Report, p. 2). He explained that such questions were not within his jurisdiction (Report, pp. 3-4). He did not specify the non-criminal charges or refer them to any other government office. Instead he expressed "an expectation that they will not remain unexplored by those who will strive to do so free from all bias and prejudice" (Report, p. 4).

Mr. Stein's disposition of non-criminal charges was entirely appropriate under the present statute. It seems equally apparent that Independent Counsel should not be charged with extending an investigation beyond violations of federal criminal laws. But when an investigation by counsel limited to criminal misconduct incidentally produces evidence that gives reason to believe that an individual covered by Title VI, Section 591, may have violated ethical standards promulgated by statute or regulation, the matter should not be allowed to drop. Independent Counsel should be empowered and instructed to bring the evidence to the attention of the Office of Government Ethics, the appropriate Inspector General, or other proper federal authority.

Prescribing that course of action would have two beneficial consequences:

First, the effect of an independent authority calling attention to possible non-criminal violations would strengthen public appreciation for the importance of non-criminal standards of conduct for government employees. Freedom from criminality or at least indictability would not as easily be seen as sufficient

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exculpation to authorize continuance in high government office. The Independent Counsel's decision -- when he finds insufficient basis for indictment -- could not as easily be misrepresented as a complete "vindication" or "exoneration" of the official in question. Reinforcing respect for standards of conduct would also encourage review of alleged non-criminal wrongdoing.

Second, a reference by an "independent" -- impartial and apolitical -- officer would create strong pressure for the appropriate authority to investigate allegations against those who, as in the case of criminal allegations, are otherwise the most likely to be immune, because of their power and status, from thorough Executive Branch inquiries into violation of relevant ethical standards. Public confidence in the integrity of government depends on the investigation and resolution of allegations concerning non-criminal, as well as criminal, offenses by those high-level officials who are subject to the Act's impartial criminal investigatory processes.

This suggestion can readily be implemented by adding a new Subsection to Section 594, reading:

(h) When investigation of violation of federal criminal laws incidentally develops evidence giving reason to investigate whether an individual covered by Section 591(a) has violated ethical standards established by federal law or regulation, but no criminal prosecution is warranted, Independent Counsel shall report such evidence to the Office of Government Ethics and any other federal agency or officer having jurisdiction over such non-criminal violations.

VI. TITLE VI SHOULD BE AMENDED TO GIVE THE JUDICIARY COMMITTEES APPROPRIATE ACCESS TO CLOSED FILES

Title VI in its present form is open to the implication that the files in cases handled under Section 591 et seq. are to be kept confidential except as provided in Title VI

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or ordered by the court. We suggest that access should be available to the Judiciary Committees upon the same conditions and to the same extent as other closed criminal files.

The point can readily be clarified by adding the following new subsection to Section 595:

(f) Members of the Committee on the Judiciary of either House of the Congress shall have access to closed files in cases handled under Section 592 to the same extent and under the same conditions as other closed files of the Department of Justice.

VII. THE SUBCOMMITTEE REPORT SHOULD CALL THE ATTENTION OF THE COURT TO THE NEED TO MAKE PUBLIC THE PENDENCY OF QUESTIONS OF LAW REQUIRING ITS DETERMINATION, TOGETHER WITH SUFFICIENT DISCLOSABLE INFORMATION TO ENABLE INTERESTED PARTIES TO FILE BRIEFS AMICI CURIAE

From time to time the division of the court authorized to appoint Independent Counsel will be called upon to decide important questions of law significantly affecting the public interest. We think it important that such issues not be decided in secret without affording interested members of the public knowledge of the questions and an opportunity to discuss them and seek leave to file briefs amici curiae.

The problem appears to have arisen in a pending case in which Independent Counsel has requested the Independent Counsel Division of the Court to expand her jurisdiction to cover additional individuals. According to The New York Times of March 9, 1987, Independent Counsel Alexia Morrison, who has been investigating Theodore B. Olson, a former Assistant Attorney General, has asked the court for a broader mandate, to include two other former high-ranking Justice Department officials. She made the request after a similar request had been denied by Attorney General Meese. The

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issue before the division of the court is highly significant. According to The New York Times, Judge George MacKinnon, who heads the three-judge panel in charge of administering the law, said the issue is whether the court has power to expand the jurisdiction of an Independent Counsel's inquiry once the Attorney General has decided on a narrower scope of inquiry. Despite the public importance of the issue, according to The New York Times, "[n]one of the filings have been made public."

We recognize -- and indeed stress -- the need to protect the reputations and privacy of individuals whose names are drawn into criminal investigations in which no indictment is warranted. But even though respect for reputations and privacy may sometimes preclude release of complete information, it should always be possible to make public sufficient information to inform the public of the questions of law that the court will decide.

Issues of law with continuing public importance should not be left to the individual parties involved in the litigation. They deserve a full and public airing. Sufficient information normally should be disclosed to enable interested parties to file helpful briefs amici curiae. In the case mentioned above, for example, the issue is the interpretation of a key provision in the current statute, with far-reaching implications for the scope of other ongoing and future investigations by Independent Counsel. The issues may also involve the constitutionality of a broad reading of the court's powers, thus potentially affecting Congressional deliberations upon reauthorization.

In our opinion the Independent Counsel Division has power to deal with the problem and release appropriate information as Title

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VI is now drawn. We think that it would be helpful, however, if the Subcommittee agrees, for its report to confirm this reading of the statute and then suggest the advisability of releasing such information about pending legal issues of public importance as can be disclosed without injury to individuals involved.

Common Cause very much appreciates the thorough work this Subcommittee has done in reviewing experience with the Independent Counsel provisions of the Ethics in Government Act. We believe the Independent Counsel mechanism has played a unique and valuable role in preserving the integrity of the government process. We strongly urge the Congress to reauthorize the Act. We further hope that Congress will take this opportunity to establish a strong record of the standards it intends to be applied in implementing the Act and make clear its opposition to any usurpation of the role of the Independent Counsel.



AMERICAN BAR ASSOCIATION

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STATEMENT OF
IRVIN B. NATHAN
on behalf of the
AMERICAN BAR ASSOCIATION
before the
SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT
of the
COMMITTEE ON GOVERNMENTAL AFFAIRS
of the
UNITED STATES SENATE
on the subject of
INDEPENDENT COUNSEL PROVISIONS
OF THE ETHICS IN GOVERNMENT ACT

March 19, 1987

Mr. Chairman and Members of the Subcommittee:

I am Irvin Nathan, a partner in the Washington law firm of Arnold & Porter. I have previously served as a Deputy Assistant Attorney General in the Criminal Division of the United States Department of Justice and as Chairman of the White Collar Crime Committee of the Criminal Justice Section of the American Bar Association. I am honored that the President of the ABA, Eugene C. Thomas, has asked me to respond to your kind invitation to appear here today to convey the Association's views with respect to the re-enactment of the independent counsel provisions of the Ethics in Government Act.

Since its founding in the nineteenth century, the ABA, the leading spokesman for the organized bar in the United States, has been devoted to promoting the fair and even-handed administration of justice throughout the country. (ABA, Constitution § 1.2) As part of this effort, the ABA recognizes the critical necessity of preserving public confidence in the administration of justice. Thus, the ABA's Standards for the Administration of Criminal Justice provide:

"It is of the utmost importance that the prosecutor avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office." (Section 1.2)

It is in light of these concerns that the ABA has been active since 1973 in promoting legislation which tends to ensure that the public retains its confidence in the administration of justice when allegations of criminal misconduct are lodged against high-ranking officials of the Executive Branch of an incumbent Administration. For the last fifteen years, special committees and representatives of the ABA have issued detailed reports on this subject, proposed and lobbied for specific legislation, testified repeatedly before Congressional committees such as yours, monitored developments under the resulting legislation, and most recently, filed briefs in court in support of the independent counsel law.

Based on this extensive involvement with the subject, the ABA is convinced that it is imperative for the administration of justice and the continued public confidence in the fairness of our system of justice that the Congress reauthorize the independent counsel provisions of the Ethics in Government Act. Our studies also convince us that, despite the recent, highly-publicized attacks on the constitutionality of this law, the independent counsel provisions, including those which authorize a designated court to appoint and define the jurisdiction of the independent counsel, are fully

consistent with the letter and spirit of the Constitution.

While we believe that certain limited refinements and modifications may be in order, our principal message to this Committee is that the basic mechanism of the independent counsel law is soundly conceived and has functioned effectively since its passage in 1978 and its re-enactment in 1982. We urge the Congress to reauthorize the statute before it expires by its terms next year.

Before addressing the few modifications we recommend, I believe it would be helpful to describe the development of the ABA's position and our perception of the evolution and implementation of the legislation over the last decade.

A. Original ABA Proposal

In the wake of the Watergate scandal and the abuses of the federal law enforcement agencies which were there revealed, the ABA created a special committee in 1973 to study federal law enforcement agencies. A central focus of the study was to "explore ways to make the law enforcement agencies professionally independent legal arms of the Government by insulating them from partisan influences" and to formulate specific recommendations to ensure that these agencies would not be improperly politicized or abused. After considerable

research, review of Congressional hearings and interviews with the Attorney General and other top federal law enforcement officials, the committee published a study in 1976 entitled "Preventing Improper Influence on Federal Law Enforcement Agencies."¹ The study concluded that basic institutional and structural reforms were essential to assure public confidence in the integrity of federal law enforcement agencies. Towards this end, the report made a series of recommendations which were overwhelmingly approved by the ABA's policy-making body, the House of Delegates, in 1976.

A major component of the recommendations endorsed by the House of Delegates was that Congress enact a mechanism which would permit the "appointment of a temporary special prosecutor by the Attorney General or by a Special Court of appointment under carefully defined circumstances and standards." The report and resolution made clear that the mechanism would only be invoked in extraordinary circumstances. The ABA opposed the creation of a permanent office of special prosecutor because it concluded that the Department of Justice must

¹ American Bar Association Report, Preventing Improper Influence on Federal Law Enforcement Agencies (1976), reprinted in part in Watergate Reorganization and Reform Act of 1975: Hearings on S. 495 and S. 2036 Before the Senate Committee on Government Operations, Part 2, 94th Cong., 1st Sess. 259-378 (1976).

bear the primary role in federal law enforcement, including prosecuting crimes involving official misconduct. The report stated that "[p]rimary responsibility for assuring the impartial administration of justice shall reside in the Attorney General."

The extraordinary circumstances requiring an exception to this general rule were presented when the Attorney General and the Department of Justice which he heads are called upon to investigate the conduct of the President of the United States or Cabinet members and other high-ranking Executive Branch officials appointed by and serving at the pleasure of the President. The ABA was mindful of the Supreme Court's observation in Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935): "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." The ABA was concerned not only about the inherent conflict of interest which such a situation presents, but also with the appearance of such a conflict. The ABA recognized that the public would only have confidence in a decision concerning the conduct of a high-ranking official if the decision were rendered by an independent, neutral party.

The mechanism proposed by the ABA for a temporary special prosecutor was as follows: When allegations

were made against a covered official meeting certain defined standards, "the Attorney General would be required to inform the Court of Appointment," composed of three retired senior federal circuit court judges appointed for a two-year term by the Chief Justice of the United States. The Attorney General's memorandum to the court would include a detailed statement of facts, legal analysis and one of the following three conclusions: a finding that a special prosecutor was not warranted, an appointment of a special prosecutor, or a request that the court appoint a special prosecutor. The ABA proposed that the court undertake judicial review of the memorandum and "take whatever action it deemed necessary." The ABA resolution said this could include the appointment of a special prosecutor different from the one proposed by the Attorney General. Further, the resolution stated that the court "could act on its own authority when in its judgment the standards require[d] appointment of a temporary special prosecutor."

In short, in 1976 the ABA called for a full judicial review of the Attorney General's decisions, including the power to appoint a special prosecutor when the Attorney General believed that none was warranted. The ABA resolution also clearly proposed that the court would delineate the jurisdiction of the special

prosecutor. While the Attorney General's memorandum could propose the jurisdiction, the ABA resolution provided that the proposed jurisdictional scope "would be reviewed by the Court and modified where necessary." Finally, the ABA proposed that the special prosecutor, who would have all of the powers and responsibilities of a United States Attorney in prosecuting a case, should be removable by the Attorney General only for "extraordinary improprieties."

ABA representatives testified before this and other Congressional committees in 1976 and 1977, urging the adoption of this mechanism. The special prosecutor provisions of the Ethics in Government Act of 1978 were patterned in large part on the ABA proposal. The principal difference was that as enacted, the statute precluded judicial review if the Attorney General reported to the court that the statutory standards did not require or warrant the appointment of a special prosecutor.

B. Implementation of the 1978 Act

Between the passage of the law in 1978 and the end of the Carter Administration in 1981, there were three reported occasions when the special prosecutor provisions were invoked. The first involved allegations against the President and other high officials concerning a White House luncheon in 1978 at which there

were allegedly solicitations of funds in violation of 18 U.S.C. § 603. Attorney General Griffin Bell conducted the required preliminary investigation. He prepared a detailed report on the investigation and, pursuant to Section 592(b) of the Ethics in Government Act, transmitted that report to the division of the court provided for in the Act. In accordance with the standards then incorporated in the statute, his report concluded that the allegations were "so unsubstantiated" that no further investigation or prosecution was warranted. Therefore, no special prosecutor was appointed. Further, pursuant to the Act, he moved to have the court approve the public release of the report. The court ordered the release, and the full memorandum of the Attorney General was made public.

As a prior representative of the ABA testified in 1981:

In our view, this is an example of the way the Act was intended to operate . . . [t]he investigation and the release of the report quieted any speculation or suspicion as to the nature of the luncheon or of any misconduct alleged to have occurred there. No one questioned the results of the investigation, and the publication of the Attorney General's memorandum effectively precluded the matter from becoming a political football. In our view, the procedure

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both produced a just result and fully reassured the public.²

In the remaining two reported instances in that period, the Attorney General requested the appointment of a special prosecutor. In both cases, the charges were the alleged use of a small amount of cocaine by White House assistants. Although the evidentiary basis for the charges was extremely weak, the Attorney General concluded that he could not find that they were "so unsubstantiated" that no further investigation was warranted. In each case, the court-appointed special prosecutor completely exonerated the public official. Again, the reports fully satisfied the public that the matters had been handled fairly and even-handedly. As the ABA concluded in 1981, "public confidence in the integrity of prosecution efforts against high-ranking officials has been bolstered in all three cases."³

C. Passage of the 1982 Independent Counsel Act

These initial reported experiences with the Act led to certain calls for reform. In light of the full-blown investigations which had been required based on

² Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 97th Cong., 1st Sess. 434-52 (1981) (statement of Herbert S. Miller on behalf of the American Bar Association at 6).

³ Id. at 8.

relatively flimsy evidence, the ABA and others suggested changes in the standard of proof required to trigger the law. Some believed that the Attorney General should have increased discretion to terminate the investigation if there were no solid basis for it. There was also legitimate concern that high-ranking officials should not be unfairly discriminated against because of their positions and subjected to extremely costly and energy-diverting investigations that they would not suffer if they were citizens in the private sector.

Accordingly, in 1981, the ABA's House of Delegates passed a resolution urging Congress to "retain the essence and general format of the special prosecutor provisions so that serious criminal charges against individuals who are closely aligned with the President can be fully investigated by an independent counsel free from any actual or perceived conflict of interest." At the same time, the ABA urged Congress to "refine the provisions of the statute to eliminate unwarranted and costly investigations" and "to ensure that covered officials are treated under the law neither more favorably nor more harshly than private citizens." The ABA urged that the triggering mechanism be modified so that the Attorney General could terminate an investigation after a preliminary investigation unless he found that there was "reasonable ground" for further

investigation. In light of the higher standards for requesting a special prosecutor, the ABA also suggested that the Attorney General be permitted to seek the appointment of a special prosecutor when, even though the statute was not otherwise triggered, "the interests of justice and the appearance of fairness in the administration of justice" require the appointment of an independent counsel.

Notwithstanding the calls of some, including the Reagan Administration, to abolish the statute, Congress re-enacted the special prosecutor provisions in 1982, incorporating a number of revisions along the lines of the ABA's proposals. Thus, Congress modified the triggering standards, giving somewhat greater discretion to the Attorney General and thus avoiding the necessity of seeking independent counsel in very marginal cases. Whereas the 1978 law provided that the Attorney General had to request the court to appoint a special prosecutor unless he found that the matter was "so unsubstantiated" that no further investigation was warranted, the 1982 law provides that the Attorney General shall determine if there are "no reasonable grounds" to believe that a further investigation is warranted. The present law also expressly empowers the Attorney General, in determining whether grounds exist to investigate further, to consider (1) the degree of specificity of

the information and (2) the credibility of the source of the information.

The Act was also amended to reduce the number of covered officials but to permit the Attorney General, even where the Act was not otherwise triggered, to apply for an independent counsel whenever he determined that the investigation by the Attorney General or other official of the Department of Justice "may result in a personal, financial, or political conflict of interest." Finally, out of concern for covered officials who might be treated more harshly than private citizens, the Act was amended to revise the name of the appointed counsel from "special prosecutor" to "independent counsel" and to authorize the court to reimburse attorneys' fees if no indictment is returned and if the fees would not have been incurred but for the requirements of the independent counsel law.

While expanding the Attorney General's discretion, Congress did not incorporate the ABA's original proposal of 1976 that the Attorney General's decisions not to seek the appointment of an independent counsel be subject to judicial review. Indeed, the current law, like the 1978 version, provides that if the Attorney General notifies the court of his decision not to seek the appointment of a special prosecutor, "the

division of the court shall have no power to appoint a special prosecutor." 28 U.S.C. § 592(b)(1).

D. Implementation of the 1982 Independent Counsel Law

Since the end of 1981, there have been thirteen reported instances where the Attorney General has been requested or has considered conducting a preliminary investigation or seeking the appointment of independent counsel.⁴ In nine of those cases, a preliminary investigation was conducted; and in six of those instances, the Attorney General sought and obtained the court appointment of an independent counsel. Two of these six independent counsel -- those investigating former Secretary of Labor Raymond Donovan and Attorney General Meese -- concluded that no prosecution was warranted. Four of the independent counsel are presently continuing their investigation.

Since the enactment of the statute, there appear to have been only two decisions which have provoked any significant controversy. No controversy has arisen where the Attorney General sought a court-appointed independent counsel. The only two decisions which have

⁴ Appended to this statement is a chart listing all of the reported instances when the Department of Justice has considered or conducted a preliminary investigation since the enactment of this legislation. There are, of course, many unreported investigations or inquiries involving covered officials.

produced considerable controversy, as measured by Congressional and press reaction, were decisions of Attorney General Meese, under the 1982 statute, declining to seek the appointment of an independent counsel for individuals who had either worked closely with him in the White House or had been high-ranking officials of the Department of Justice. These matters involved former Deputy Attorney General Edward Schmults, former Assistant Attorney General Carol Dinkins, and former White House Aide Faith Ryan Whittlesey, now Ambassador to Switzerland.

In each of these cases, Attorney General Meese, like Attorney General Bell in the White House luncheon case, requested and obtained public release of the full report of his decision not to seek an independent counsel. In light of our recommendation to modify the legislation, it may be useful to analyze the situations involved in these two controversy-provoking reports.

In December, 1985, the Chairman of the House Judiciary Committee sent the Attorney General a letter requesting that he apply to the court for the appointment of an independent counsel to investigate allegations of criminal misconduct in the Department of Justice's role in withholding documents from Congress in connection with an investigation of the Environmental Protection Agency. A detailed Congressional report,

which, along with appendices totaled over 3,000 pages, accompanied the request. In April, 1986, the Attorney General submitted a report to the special court which (1) requested the appointment of an independent counsel to investigate allegations that former Assistant Attorney General Theodore Olsen provided false testimony to Congressional committees regarding the Administration's handling of the EPA matter, and (2) explained his decision not to seek the appointment of an independent counsel to investigate former Deputy Attorney General Schmults and former Assistant Attorney General Dinkins on charges, growing out of the same matter, that they had deliberately misled Congress by withholding documents.

As to former Deputy Attorney General Schmults, the report recited that he had taken personal responsibility for advising a Congressional committee of the Department's decision to withhold handwritten documents, that he had failed to do so and that the committee did not know that the documents were being withheld for approximately one year. However, the report concluded that there were no "reasonable grounds" for further investigation, explaining: "The principal basis for this conclusion is the lack of evidence of criminal intent on the part of Mr. Schmults. . . . The investigation . . . may well be thought to show

negligence on [his part] . . . [t]he facts do not, however, make out evidence of a corrupt motivation or criminal intent on the part of Mr. Schmuls."

As to Ms. Dinkins, the report concluded that her decision to withhold a chronology which had been called for by the committee's request for documents also lacked "any indicia of criminal intent" and "it is not reasonable to expect that further investigation would develop sufficient evidence to prosecute." With respect to a declaration which she filed in a related civil suit concerning the withheld documents, the Attorney General found that the statement itself was accurate and that any allegations that it was misleading derived from other court documents which were not drafted by Ms. Dinkins. The report concluded that there was "insufficient evidence" to warrant further pursuit of a criminal investigation.

From press reports, it appears that during the course of the Olsen investigation, the independent counsel requested the Attorney General to expand the jurisdiction to include Mr. Schmuls and Ms. Dinkins. The Attorney General declined. Thereupon, the independent counsel requested the court to expand the scope of the Olsen investigation to cover Mr. Schmuls and Ms. Dinkins. From press accounts, it appears that the Attorney General, in a confidential filing with the

court, has sought to block any expansion of the independent counsel's jurisdiction, apparently claiming that under the statute, the Attorney General's consent is required before the court can expand the independent counsel's prosecutorial jurisdiction.

In the matter involving Faith Ryan Whittlesey, the Ambassador to Switzerland, there were three basic allegations. First, it was alleged that she had improperly used funds privately donated to the embassy for food, lodging and entertainment of individuals, including personal friends and United States employees, who did not qualify under law to be entertained with these funds. One of the improperly expensed items was an embassy party for the Attorney General and his staff. Second, it was alleged that she had improperly assisted donors to the fund, including the appointment to her staff of the son of one of the donors. Third, there were allegations of obstruction of justice involving alleged threats to terminate the Deputy Chief of Mission if he cooperated in providing embassy records to the State Department. Ms. Whittlesey was a "covered official," not because of her position as Ambassador, but because of her prior White House position in the Reagan Administration.

The Attorney General's report found no reasonable basis for continuing the investigation as to any of

these allegations and concluded that no independent counsel was warranted. With respect to the allegedly improper use of the funds, the report found that while the funds were improperly used, there was no evidence that the Ambassador knew of the restrictions on their use. With respect to aid to the donors, including the appointment of a donor's son to her staff, the report concluded that there was no proof of a quid pro quo. The report said: "There is no direct evidence that a donation was made to [the] gift fund in return for the performance of an official act." The report stated that: "In the absence of such evidence, [the son's] appointment near the time of his father's donation, in itself, is insufficient to turn an otherwise legal contribution into a [unlawful] gratuity."

With respect to the allegations of obstruction of justice, the report detailed the conflicting versions of four telephone conversations between the Ambassador and the Deputy Chief of Mission. The report also recited interviews of the Ambassador's lawyers, who were not actually on the telephone, but who were present in an office with the Ambassador and overheard significant portions of the Ambassador's side of the conversation. The Attorney General's report concluded that no independent counsel was warranted because, under the same circumstances, there would be no prosecution of a

private citizen under established Department of Justice policy. The report concluded that a reasonable prosecutor would not seek an indictment on the facts presented because of the absence of any reasonable prospect of conviction, a sine qua non to the initiation of any prosecution under Department of Justice guidelines. The report observed that: "No harm resulted from Ambassador Whittlesey's conduct, which occurred at a time of great personal stress for the Ambassador and concern over personal efforts to discredit her."

As noted, there have been a number of press reports of Congressional criticism of the decision not to seek a court-appointed independent counsel to investigate the allegations of Ms. Whittlesey. In addition, the New York Times has reported that a Justice Department official stated that an internal investigation has begun to determine whether the Attorney General acted properly when he decided not to seek an independent counsel in this case. New York Times, December 16, 1986, at A15.

E. Need for Re-Enactment and Modification of the Independent Counsel Law

Ten years' experience with the independent counsel provisions confirms the ABA's view that the concept remains critical to the public perception of

fairness in the administration of justice and that the mechanism chosen by Congress has worked generally well toward achieving that end. The appointment of eight special prosecutors or independent counsel in the last decade suggests that there is a well-founded, continuing need for the mechanism. Further, the public's general satisfaction with the decisions of the independent counsel selected by the court, as reflected by Congressional and newspaper editorial response, tends to establish that the statute has served its purpose in assuring public confidence in the integrity of the administration of justice where high Executive Branch officials are involved.

The data indicate that the independent counsel provisions are being employed with a frequency consistent with the purposes of the law. There are few enough cases that appointment of an independent counsel investigation is, as it should be, an unusual event. On the other hand, there have been a sufficient number of cases in which the Attorney General has found it necessary to seek the appointment of an independent counsel to demonstrate the continuing need for the Act. In the process, the independent counsel provisions have become an important symbol of our nation's commitment to the rule of law. As one newspaper editorialized upon the appointment of an independent counsel, "whatever

happens. the special prosecutor law would have done its job: to guarantee that powerful officials are treated -- and appear to be treated -- like other citizens." New York Times, May 11, 1982, at A18.

Some proof of the utility of the statute is provided by the reactions of a number of covered officials, who have become targets of allegations. For example, Edwin Meese III and Michael Deaver, who served as top assistants to President Reagan, and former Secretary Raymond Donovan publicly requested the appointment of independent counsel to investigate allegations which had been raised against them and widely circulated in the press. These requests reflected an apparent recognition that they could never be fully vindicated in the public's eyes unless the investigation were handled by a truly independent counsel. They apparently recognized that if they were cleared by political appointees of the same President that they had served so closely, the public would always have the nagging suspicion that they were the recipients of unduly favorable treatment. Indeed, when an independent counsel exonerated Mr. Meese of all of the allegations, he was able to be confirmed as Attorney General and to obtain the full confidence of the American public.

The independent counsel laws may also serve a salutary purpose for an Administration which wants to avoid potentially embarrassing appearances of conflict of interest. Although the Reagan Administration has from the beginning called for the abolition of the independent counsel law, claiming it does "more harm than good,"⁵ it was to the independent counsel law that the President turned when confronted with the most difficult problem of his presidency. Approximately one week after the Attorney General reported that there were "serious questions of propriety" about a possible diversion of funds from Iranian arms sales to the contras, the Attorney General announced that he would apply for the appointment of an independent counsel to investigate the matter "with the full encouragement and support of the President." When the court appointed Lawrence Walsh as independent counsel, President Reagan issued a statement on the same day, welcoming the appointment of an independent counsel and promising his full cooperation. And when the Walsh appointment was under attack in court by one of the principal targets of the investigation, the Attorney General announced that

⁵ Special Prosecutor Provisions of the Ethics in Government Act of 1978: Hearings Before the Subcommittee on Oversight of Government Management of the Senate Government Affairs Committee, 97th Cong., May 20, 22, 1981 at 116, 117 (Statement of then Associate Attorney General Rudolph Giuliani).

he was making a parallel appointment of Mr. Walsh to avoid any question about his continuing the investigation. The Department of Justice also pointedly refrained from joining in the constitutional attack of the independent counsel provisions, notwithstanding the past dictum of certain members of the Administration, apparently recognizing that only an independent investigation could lead to sufficient public confidence in the outcome of this very controversial matter.

In light of the experiences with the statute, which I have recited, the ABA believes that there should be two principal revisions to the re-enacted version of the independent counsel law. As the ABA proposed in 1976, we believe there should be judicial review of the Attorney General's decisions not to seek the appointment of a special prosecutor. The ABA also suggests the statute should be clarified that the court may, after the appointment of the independent counsel, expand or modify the prosecutorial jurisdiction of the independent counsel. We believe that this point is intended by the present legislation; all that is needed is the clarification of statutory language.

Judicial review is more imperative today than it was in 1976. As noted, in 1982 the Congress expanded the discretion available to the Attorney General during the preliminary investigation phase. The statute

altered the mechanism triggering the appointment of an independent counsel, making it easier for the Attorney General to terminate an investigation which he did not believe warranted. It also expressly permitted the Attorney General to assess credibility and evaluate the specificity of the evidence. We believe that this expansion of the Attorney General's discretion was warranted in order to prevent unfair treatment of covered individuals and to protect against a large number of needless investigations which are costly and time-consuming, both for the Government and the individuals involved. At the same time, the enhanced latitude provided to the Attorney General requires some off-setting review by the court to assure the public that there is a rational and justifiable basis for the Attorney General's conclusion that no independent counsel investigation is needed.

The questions raised by the Attorney General's decisions not to seek independent counsel in the Schmults, Dinkins and Whittlesey matters underscore the need for judicial review. We believe that it is not a coincidence that these questions have arisen in two matters decided under the 1982 law, where questions of credibility were raised concerning individuals who were perceived to have a close relation with the Attorney General or the Department of Justice. This is not to

say that the Attorney General's decisions were incorrect or inconsistent with the standards of the statute. The ABA takes no position with respect to the correctness of those decisions. The only point is that the public would have considerably more confidence if these decisions were subject to review by, and bore the imprimatur of, a dispassionate court.

Without judicial review, there is no way to ensure that the Attorney General is adhering to the standards established by Congress. Unless the Attorney General's reasons can be and are analyzed by the court which reviews his report, the public cannot be entirely satisfied that a fair and impartial judgment, uninfluenced by political or personal factors, has been rendered.

We return to the proposal the ABA made in 1976. After receiving the report of the Attorney General, we believe the court should be authorized to take "whatever action it deem[s] necessary," including the appointment of an independent counsel, even when not requested by the Attorney General. The review would be similar to that which exists in oversight of many other agency actions, i.e., whether the Attorney General has complied with the standards of the statute and whether he has abused his discretion in declining to seek an independent counsel. We believe that the prospect of

judicial review would tend to maintain compliance with the statute and reassure the public that the standards are being satisfied.

In our view, the standards of the statute are sufficiently clear, and the court is perfectly capable of determining whether there has been compliance with them. The statute requires the Attorney General to determine if there is a "reasonable basis" to investigate further. A review of that judgment is not different in kind from those in which courts review whether an agency's action has a "reasonable basis" or whether there is probable cause to issue a search warrant.

It is important to emphasize that the court will not be determining whether or not there should be a prosecution. If the court finds that under the statutory standards an independent counsel is necessary, it will appoint a responsible individual to make the prosecutorial judgment. The court will not be involved in making any such judgments. We note further that it is not unprecedented for a court to refer matters for criminal investigation. See e.g., 18 U.S.C. § 3332(a) ("offenses against the criminal laws of the United States alleged to have been committed within that district . . . may be brought to the attention of the

grand jury by the court . . . for the presentation of evidence"). (Emphasis added.)

The ABA proposal for judicial review does not contemplate private lawsuits or review of a decision not to undertake a preliminary investigation. Review would be based on the report submitted to it by the Attorney General at the conclusion of a preliminary investigation. In addition, the division of the court would have the authority, sua sponte, based on information from many sources, including the press or the Congress, to appoint an independent counsel. Lawsuits brought by individual citizens all across the country could subject covered officials to unfair harassment and abuse, divert the Department of Justice from more pressing concerns, and involve the courts in a large number of potentially baseless matters.

There have been three private lawsuits brought to compel preliminary investigations. Each involved highly political matters -- the Administration's policy in Nicaragua, the 1980 presidential debates, and the Ku Klux Klan. In each case, the Court of Appeals dismissed the action, finding that Congress intended no private right of action to initiate judicial review. We believe that these cases were correctly decided and that the legislation should not be amended to permit individual lawsuits. If an individual has specific

information of criminal misconduct by high government officials, he has the ability to inform law enforcement agencies, the Congress and the press. In addition, Congress has the power under the law to request specific written explanations from the Attorney General for his decisions not to seek an independent counsel. 28 U.S.C. § 595(e). This tends to ensure that the necessary investigation will be conducted prior to the response to Congress. In light of these alternatives, we believe there is no need -- and much potential mischief -- to authorize private lawsuits to compel or review decisions of the Attorney General.

As noted, we believe it would be appropriate to clarify the role of the division of the court in expanding or modifying the prosecutorial jurisdiction of the independent counsel after the investigation has begun. An ambiguity exists in the present statutory language. There is no doubt that as an initial matter, it is the court's responsibility to "define [the] independent counsel's prosecutorial jurisdiction." 28 U.S.C. § 593(b). However, Section 593(c) states that the court, "upon request of the Attorney General . . .," may expand the jurisdiction of an existing independent counsel's investigation. Section 595(e) states that the independent counsel may request either the Attorney General or the court to refer additional matters related

to his prosecutorial jurisdiction. The problem is that the statute nowhere states explicitly that the court may refer additional matters or expand the scope of the jurisdiction if such expansion is opposed by the Attorney General. This ambiguity may be contributing to the current controversy between the independent counsel appointed to investigate Mr. Olsen and the Attorney General over whether the court may, upon the independent counsel's request, expand her jurisdiction despite opposition from the Attorney General.

The ABA has from the first proposed that the court should delineate the jurisdiction of the independent counsel and should be free to modify any proposed statement of jurisdiction submitted by the Attorney General. As independent counsel Lawrence Walsh recently stated in a memorandum to the court in the case brought challenging his jurisdiction by Lt. Colonel Oliver North, "To allow the appointment of an independent counsel and then have the ensuing investigation circumscribed by those whose potential conflicts created the need for the independent counsel would make no sense."

We believe that the plain intent of the existing statute is that the court has the authority to expand the jurisdiction of the independent counsel either at the request of the independent counsel or of the

Attorney General and may expand the independent counsel's jurisdiction even if the Attorney General objects. This reading of the statute is borne out by the legislative history which includes this observation:

[E]ven if the Attorney General should not request that related matters be assigned to an existing special prosecutor, the court has the authority to do so under subsection [593(b)] The Committee's intent to specifically grant the court that authority is indicated by the first sentence of subsection 594(a) which gives the special prosecutor the authority to request that the division of the court refer matters related to the special prosecutor's prosecutorial jurisdiction to the special prosecutor. The court's responsibility in defining the prosecutorial jurisdiction of an existing special prosecutor is a continuing one.⁶

The clarification can consist of a single sentence which provides that the court has continuing authority to modify the jurisdiction of the independent counsel sua sponte, or at the request of either the independent counsel or the Attorney General.

F. The Constitutionality of the Independent Counsel Law

Because of the recent lawsuits and assertions by some, including an Assistant Attorney General, challenging the constitutionality of the independent counsel law, I will explain briefly the ABA's long-

⁶ S. Rep. No. 95-170, 95th Cong., 1st Sess. 65 (1977).

standing view that the independent counsel provisions are fully consistent with the Constitution. This analysis is derived from legal memoranda provided by the ABA to this Committee in 1976 and in 1982, and the ABA's recently filed amicus curiae briefs in support of the constitutionality of the law in the suits brought by Lt. Colonel North and Mr. Deaver.

The criticism that the independent counsel provisions of the Ethics in Government Act violate the separation of powers doctrine attributes a rigidity to that set of principles which the courts have repeatedly rejected. Mr. Justice Holmes observed, "The great ordinances of the Constitution do not establish and divide fields of black and white." Springer v. Philippine Islands 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). To the contrary, the Supreme Court has held that the three branches are not "hermetically sealed" from one another, see Buckley v. Valeo, 424 U.S. 1, 122 (1976), and that a "pragmatic, flexible approach" governs separation of powers cases. Nixon v. Administrator of General Services, 433 U.S. 425, 442 (1977).

The argument that the independent counsel provisions of the Ethics in Government Act violate the doctrine of separation of powers is essentially twofold: First, it is claimed that the judiciary may not appoint

the independent counsel because he performs an executive function; second, it is argued that Congress may not limit the executive's power to remove the independent counsel, again because he performs an executive function. Each of these arguments is at odds with the controlling decisions of the Supreme Court and the lower federal courts.

The court appointment of the independent counsel is authorized by the express terms of the Appointments Clause of Article II of the Constitution which empowers Congress to "vest the Appointment of such inferior Officers as they think proper in the President alone, in the Courts of Law, or in the Heads of Departments." (Emphasis added.)⁷ Congress has determined that an independent counsel is an "inferior officer," H.R. 1307, 95th Cong., 2d Sess. §2 (1978); S. Rep. No. 170, 95th Cong., 1st Sess. 6 (1979). This is the same status accorded the Watergate special prosecutor.⁸ The independent counsel thus may be appointed by a "court of law."

⁷ U.S. Const. art. II, § 2, cl. 2.

⁸ Under Article II, § 2, cl. 2, principal officers must be appointed by the President and confirmed by the Senate. United States v. Germaine, 99 U.S. 508, 509-10 (1878). The Watergate prosecutor's appointment was not subject to Senate confirmation.

Appointment of the independent counsel by the courts does not violate separation of powers principles. The Supreme Court has repeatedly upheld judicial appointment of officers performing executive functions. See Ex Parte Siebold (election supervisors); Rice v. Ames, 180 U.S. 371, 378 (1901) (commissioners); Go-Bart Importing Co. v. United States, 282 U.S. 344, 353 n.2 (1931) (commissioners who, inter alia, institute civil rights prosecutions). In United States v. Solomon, 216 F. Supp. 835, 840-43 (S.D.N.Y. 1963), the court upheld a Congressional statute authorizing the district courts to appoint temporary United States Attorneys.

The Congressionally imposed limitations on the executive's removal power are also constitutional. Short of impeachment, an independent counsel may only be removed by the Attorney General for "good cause, physical disability, mental incapacity, or any other condition that substantially impairs" his performance. 28 U.S.C. § 596(a)(1). In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court observed with approval in no less than three places of its opinion that the President could not remove the Watergate special prosecutor except for "gross impropriety" and after consultation with Congress, 418 U.S. at 694 n.8, 696, 696 n.10. The court plainly viewed these

requirements as substantial restraints on the President's removal power.

The Nixon case is consistent with Wiener v. United States, 357 U.S. 349 (1958) and Humphrey's Executor v. United States, 295 U.S. 602, 625-26 (1935). These cases hold that the Executive's removal power may be limited in the case of officers "whose tasks require absolute freedom from executive interference." Wiener v. United States, 357 U.S. at 353. This description aptly fits the office of the independent counsel.

Alternatively, the limitations on the President's removal power may also be upheld as flowing from Congress' power to assign the appointment of the independent counsel to the special court. As the Supreme Court stated in United States v. Perkins, 116 U.S. 483 (1886):

"The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact." 116 U.S. at 485.

The Supreme Court's recent rulings in INS v. Chadha, 462 U.S. 919 (1983) and Bowsher v. Synar, 106 S. Ct. 3181 (1986) do not affect the constitutionality of independent counsel provisions. These cases are inapposite. In Chadha the court struck down the one-house veto because that device constituted

an attempt by Congress to legislate without complying with the constitutional requirements that laws be passed by both houses of Congress, Art. I, §§ 1, 7, and presented to the President. Art. I, § 7, cl. 2. 462 U.S. at 951-59. In Bowsher, the court held that Congress could not "reserve for itself the power of removal of an officer charged with the execution of the laws." 106 S. Ct. at 3188. The court expressly stated that it was not addressing the question of whether Congress might impose limitations on the executive's removal power, 106 S. Ct. at 3188 & n.4, as is the case under the independent counsel law.

The essence of both Bowsher and Chadha is that Congress may not usurp executive functions for itself. See North v. Walsh, et al., Nos. 87-0457, 87-0626, slip op. at 14-15 n.9 (D.D.C. March 12, 1987); Buckley v. Valeo, 424 U.S. 1, 129 (1976) (emphasizing framers' "fear that the Legislative Branch . . . will aggrandize itself at the expense of the other two branches"). The independent counsel law simply provides a limited counterweight to the potential abuse of executive power; it usurps no executive power for the Legislative Branch because the independent counsel is independent not only of the President but of Congress as well.

For these reasons, the three courts which have to date considered challenges to the constitutionality of

the independent counsel provisions have refused to set aside the law. Most recently, in North v. Walsh, et al., supra, and Deaver v. Seymour, No. 87-0477, slip op. (D.D.C. March 11, 1987), the courts rejected challenges to the constitutionality of the Act. In each case, the principal ground was that the suit was premature. Each court, however, also opined that the independent counsel provisions are constitutional. As Judge Parker held in North v. Walsh, "[p]laintiff's rigid vision of the separation of powers doctrine is not supported by our constitutional structure of government." Slip op. at 14 n.9. In the only other case to consider the constitutionality of the Act, Banzhaf v. Smith, 588 F. Supp. 1498 (D.D.C.), vacated on other grounds, 737 F.2d 1167 (D.C. Cir. 1984), the court reached the same result, describing the Act as a "modest, narrowly-drawn, prophylactic" measure which may not be invalidated under a "crabbed interpretation of the Constitution." 588 F. Supp. at 1508.

The addition of a provision which would permit judicial review of decisions by the Attorney General not to seek appointment of an independent counsel, such as that originally proposed by the ABA, would clearly be constitutionally sound. The same constitutional provisions and precedents which demonstrate that it is constitutional for the court to appoint an independent

counsel, at the request of the Attorney General, establish that the Constitution permits the Congress to authorize the court to appoint an independent counsel, even over the objection of the Attorney General. Neither Article II, Section 2 nor the cases interpreting it suggest that the judiciary's appointment power, if granted by Congress, is dependent upon the consent of the executive. The court may be empowered to review a decision of the Attorney General not to request appointment of an independent counsel just as it may be given the authority to appoint an independent counsel at the request of the Attorney General.

The Supreme Court has repeatedly held that Congress may authorize the court to review agency action, including an agency decision not to initiate enforcement efforts. See, e.g., Heckler v. Chaney, 105 S. Ct. 1649 (1985); Dunlop v. Bachowski, 421 U.S. 560 (1975). In Dunlop v. Bachowski, the Supreme Court reviewed and reversed a decision of the Secretary of Labor not to bring an action to set aside a union election under Title 29, United States Code, Section 482(b), which requires the Secretary to act "if he finds probable cause" of a statutory violation. 421 U.S. at 566-68. In Heckler v. Chaney, the Supreme Court held that there was a presumption against judicial review of agency decisions not to prosecute. The court,

however, held that the presumption "may be rebutted" and that the decision to permit judicial review of decisions not to prosecute "is in the first instance for Congress." 105 S. Ct. at 1656-57. In sum, Congress clearly has the power to provide for judicial review of the Attorney General's decision not to apply for appointment of an independent counsel should it choose to enact such a provision.

CONCLUSION

The events from the Watergate scandal through the Iran-contra affair demonstrate the continuing need for a mechanism to assure the public that allegations of criminal misconduct by high-level Executive Branch officials will be investigated by neutral, independent counsel, who are free from partisan political ties or pressures. Based on its studies of the legislation and its implementation over the last ten years, the ABA is convinced that the independent counsel law is constitutional and has served the nation well to preserve the public's confidence in the fair administration of justice. The only perceived flaw has been that, as the Attorney General's discretion under the law has increased, there have been rare occasions when the public has expressed some concerns with decisions not to seek an independent counsel. Accordingly, the ABA urges the re-enactment of the

independent counsel law as modified to permit judicial review of an Attorney General's decision not to seek the appointment of an independent counsel.

REPORTED INSTANCES IN WHICH THE ATTORNEY GENERAL WAS REQUESTED TO CONDUCT
A PRELIMINARY INVESTIGATION OR SEEN APPOINTMENT OF AN INDEPENDENT COUNSEL

DATE	SUBJECT OF INVESTIGATION	PRELIMINARY INVESTIGATION	INDEPENDENT COUNSEL APPOINTED	PROSECUTION BY INDEPENDENT COUNSEL
2/79	President Carter, et al.	YES	NO	NO
11/79	Hamilton Jordan	YES	YES	NO
8/80	Timothy E. Kraft	YES	YES	NO
12/81*	Richard V. Allen	NO	NO	NO
12/81	Raymond J. Donovan	YES	YES	NO
4/82	William J. Casey	YES	NO	NO
7/82	GREENSBORO RULUX RIAN CASE: Attorney General Director of FBI	NO	NO	NO
1/84	JOINT ACTIVITIES IN NICARAGUA: Ronald Reagan, William J. Casey, Alexander Haig, Jr., Thomas C. Clines, Caspar Weinberger, Nestor Sanchez	NO	NO	NO
2/84**	1980 PRESIDENTIAL CAMPAIGN: James A. Baker III, David Stockman, David Gergen, Richard V. Allen, William J. Casey	NO	NO	NO
3/84	Edwin Reese III	YES	YES	NO
4/86	Theodore Olsen	YES	YES	Continuing Investigation
4/86	Edward Schmitts	YES	NO	NO
4/86	Carol Dinkins	YES	NO	NO
5/86	Michael R. Deaver	YES	YES	Continuing Investigation
12/86	Faith Ryan Whittlesby	YES	YES	NO
12/86	IMAN INQUIRY: Olliver L. North, et al.	YES	YES	Continuing Investigation
1/87	Franklyn C. Notziger	YES	YES	Continuing Investigation

* State Department of Justice issued statement closing inquiry

** Department of Justice Report

STATEMENT OF LLOYD N. CUTLER
Before The
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
Of The
COMMITTEE ON GOVERNMENTAL AFFAIRS
Of The
UNITED STATES SENATE
On The Subject Of
TITLE VI
Of The
ETHICS IN GOVERNMENT ACT
March 20, 1987

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to appear before you today to testify on the subject of reauthorization of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-98. I believe this law is critical to public confidence in the ability of our federal criminal laws to operate impartially with respect to even the highest and most influential government officials. This is in turn essential to public confidence in the acts taken by government generally. The system that is currently in place has worked fairly and has successfully enhanced public confidence. It is appropriate that it be examined every five years, but it would be a mistake to substantially amend the law at every point of reconsideration. Consistency is critical to neutrality; even this law can be seen to be politically motivated if it is significantly altered at every reevaluation.

As I have expressed when I have testified on this legislation in earlier sessions of Congress, I have a great deal of confidence that the statute as it exists should survive constitutional scrutiny. I will not attempt in this testimony to expand at length on my views on this point because you have available to you a number of briefs prepared for judicial challenges and statements made in previous hearings. Let me instead comment on

the specific questions posed by Senators Levin and Cohen in their letter to those invited to testify.

1. Title VI should be reauthorized in substantially the same form. I believe the mechanism in place has received thorough congressional scrutiny and has worked well in practice. I do not support substituting for it an ad hoc system that gives the Attorney General greater discretion, as would some of the other mechanisms that have been suggested.

Should you nevertheless decide to reconsider the mechanism of appointment of independent prosecutors, I would urge you to have in place a procedure that the Attorney General and the public at large can have confidence will result in a fair and effective investigation and prosecution should he elect to invoke it. An Attorney General must know that when he recuses himself from a case he is not disabling the prosecution. Currently, if an Attorney General has a personal or financial conflict of interest he can recuse himself and turn the prosecution over to subordinate officials in the Department of Justice. As the many years of consideration of an independent counsel or special prosecutor act has recognized, this is not adequate when the Attorney General recuses himself because of a political conflict of interest, because the same political conflict is likely to apply to most of the ranking lawyers in the Department, especially the presidential appointees and, in turn, their appointees. We

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therefore need in place a system as well-defined as the one which currently exists in order to give the Attorney General assurances that a qualified and unconflicted person will be available to discharge the responsibility.

In addition to the independent counsel mechanism now law, a similar mechanism could be deployed which would change simply the means of selection and removal of the independent counsel, but not the other provisions concerning the point at which an Attorney General should seek such a prosecutor and the authority of an independent counsel when in office. I have previously proposed that the President could nominate and the Senate confirm a standing panel of six independent counsel. When an allegation triggering the statute arises, the Attorney General would make a referral to the court which could select a member of this previously appointed panel. Alternatively, I see no difficulty in authorizing the Attorney General to make this selection.

2. Let me reemphasize that I do not believe that any amendment to the method of selection in existing law is necessary in order for the independent counsel provisions to be constitutional. I merely suggest these alternatives for your consideration should you decide to pursue other means of providing for an independent prosecutor. If the Supreme Court should later find the present method of appointment to be unconstitutional, this proposal could provide a legislative correction that would clearly be constitutional.

3. You have asked whether standards governing an Attorney General's recusal from a Title VI case should be included in the text of the statute. I would point out that standards already exist in the statute, in that the Act determines that disposition of significant criminal charges against covered individuals creates an inherent conflict of interest and therefore requires recusal by the Attorney General. As has been pointed out many times, the Attorney General is both the chief prosecutor for the federal government and a member of the President's cabinet. These roles conflict when the President's political interest is directly at stake in a decision whether or not to prosecute, as it is whenever a covered official is the target. It is for this reason that if further inquiry beyond a preliminary investigation is required -- such as an investigation requiring documents to be subpoenaed or witnesses to be placed under oath to evaluate their credibility -- an independent counsel should be sought by the Attorney General. The need for recusal of the Attorney General at the preliminary investigation stage is therefore quite insignificant because credible evidence requiring additional investigation should be referred over to an independent counsel. The statute does not allow a great deal of discretion at the preliminary investigation stage.

Nevertheless, circumstances will arise where it would at least appear improper for the Attorney General to be the official determining whether there exists "reasonable grounds to

believe that further investigation or prosecution is warranted," 28 U.S.C. § 592(c)(1), which is the predicate to initiating appointment of an independent counsel. I can see the utility of including a statutory provision that would require recusal by the Attorney General from a preliminary investigation if, for example, the facts alleged are such that it must be determined whether the Attorney General himself participated in the criminal conduct or cover-up of such conduct. But such circumstances will generally be covered by the same standards that would require his recusal in matters not arising under the independent counsel provisions.

4. The Attorney General would not be justified in refusing to initiate a preliminary investigation solely because he determines that evidence substantiating one of the elements of a crime is weak or absent from the case. In virtually every case in which an allegation is made against a covered official, the Attorney General will need to initiate a preliminary investigation to determine whether further investigation is warranted. The exception would be limited to circumstances where it would be impossible for the covered official to have committed the act alleged, for example because he was giving a speech in another city at the time the crime took place. There is no responsibility on the part of the source of the allegation to specify all elements of the crime, and certainly not to provide any evidence whatsoever that satisfies a burden of proof regarding the

elements of a crime. It is the responsibility of the Attorney General to conduct a preliminary investigation into an allegation "whenever [he] receives information sufficient to constitute grounds to investigate," to determine whether further investigation is warranted. 28 U.S.C. § 591(a). At that point, if it is, the Attorney General must refer the matter to an independent counsel.

It is difficult to say as an absolute matter whether the lack of evidence on a particular element of a crime at the conclusion of a preliminary investigation would justify a decision by the Attorney General not to request an independent counsel. If the Attorney General can determine with certainty during the course of a preliminary investigation that a critical element of a crime does not exist and that no reasonable and typical investigation could be proven, then it would be appropriate to determine that an independent counsel is not warranted. The one area where it is least likely that the Attorney General can reach this conclusion is with regard to evidence of criminal intent. If he determines that other elements of a crime exist but that he cannot establish evidence of the covered official's criminal intent, this seems the most appropriate and important case for referral to an independent counsel. It is precisely this evaluation of the state of mind of a covered official that calls for an exercise of independence by a prosecutor who does not have any apparent or real political conflict of interest.

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5. In my view, judicial review of an Attorney General's decision not to conduct a preliminary investigation is a poor idea. Any allegation made to the Attorney General can be made to the Congress or to the press, and therefore an appeal to public opinion is always available. This appeal can put pressure on an Attorney General in an egregious situation to conduct a preliminary investigation. But as with other matters entrusted to the Attorney General's discretion, it is this appeal to public opinion with its ultimate demand of removal from office that provides an adequate safeguard. Judicial review in this context could provide a dangerous means of witch-hunting, and subject target individuals to the expense of defending themselves on appeal as a matter of course. It is too much to ask of those who serve our government.

6. Section 594(e) of Title VI authorizes an independent counsel to request expanded prosecutorial jurisdiction from the Attorney General or from the court. I do not believe that this provision was intended, nor should it allow, application for expanded jurisdiction to investigate additional persons implicated during the course of an independent counsel's investigation without a new referral by the Attorney General. I think in this regard the Hamilton Jordan-Timothy Kraft incident was handled appropriately. When in the course of the special prosecutor's investigation of Mr. Jordan similar allegations came up against Mr. Kraft, the special prosecutor included this

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information in his report to the Attorney General. The Attorney General evaluated these, had the opportunity to conduct whatever preliminary investigation he felt necessary in addition to the information given him by the special prosecutor, and determined to request the appointment of a new special prosecutor to investigate Mr. Kraft.

This is not an efficient system, I admit, but it preserves the important role of the Attorney General in seeking an independent counsel to investigate an individual. I believe this is an important aspect of the constitutionality of the overall mechanism. I appreciate that a very unpalatable situation could result where an independent counsel pursues a target for conspiracy, for example, but is disabled from pursuing or prosecuting the other conspirators. In some circumstances, however, the trials could be joined. Most importantly, the constitutional balance outweighs the messiness in the system.

7. I do not consider myself an expert on grand jury matters and therefore I will not comment on the application of Rule 6(e) to materials compiled by an independent counsel. I would only submit that those of us who have been supportive of the independent counsel provisions from the beginning have assumed that the same protections in the prosecutorial process that apply with respect to the Department of Justice should apply to an independent counsel. So to the extent an independent

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counsel is substituting for the Attorney General, those protections for the grand jury process that arise out of Rule 6(e) should apply.

8. Similarly, questions of access to materials compiled by an independent counsel should be answered in the same manner as if the independent counsel were the Attorney General. An independent counsel must be able to make his own decisions as a surrogate for the Attorney General. He should not be able to be ordered by the Attorney General to make papers available. Nor should his relationship with Congress in this regard be any different than is that of the Attorney General.

9. The current statute assumes a wise posture with regard to public access to court filings in cases referred to an independent counsel. It is the court that must determine in each instance what papers are to be made available to the public. It seems to me this process has worked well to date, balancing the interests of the individual and those of the public's right to access. Obviously, if an indictment is sought, then the prosecution of a case is part of the public judicial proceedings as is any prosecution by the Department of Justice.

* * *

In closing, I would add that one aspect of this law that has not been given adequate attention is the effect that it

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should have on covered officials over time. Covered officials from an incumbent administration must know that they are not above the law, and should they commit a crime they will be investigated and prosecuted by an individual independent of the influences of that administration. Similarly, these officials must have confidence that through their government service they will not subject themselves to unfair application of the criminal laws because the prosecutor will work them over harder in order to demonstrate objectivity. It is just as important that government officials know that when they leave government service and the opposition party assumes the administration of the criminal laws, they will not be unfairly sought out by that administration for harassment or harsh treatment.

It is essential to build fairness into all of our laws, but the criminal laws in particular demand sometimes extraordinary procedures to insure that they are applied in an evenhanded, objective and fair manner. It is critical to a civilized society that penalties for violation of criminal statutes cannot be imposed for political ends. It is just as important that our citizens and government officials know that our criminal justice system will not tolerate even the appearance of political manipulation of criminal prosecution.

Thank you for inviting me today. I would be happy to answer any questions you may have.

STATEMENT OF
BENJAMIN R. CIVILETTI, ESQUIRE

Before The
SENATE SUBCOMMITTEE ON
OVERSIGHT OF GOVERNMENT MANAGEMENT

Friday, March 20, 1987

Mr. Chairman and Members of the Committee, I am pleased to respond to your invitation to testify. In line with that invitation, my prepared remarks will be brief and primarily focussed on the question of when an Attorney General should recuse himself from making the judgment of whether to request appointment of an independent counsel. I also will make a few other general observations about the current statute, and then would be happy to respond to questions.

First, the issue of recusal. You probably know that as Attorney General I did not recuse myself from a decision on whether to request an independent counsel, or "special prosecutor" as the position then was known. In each instance, I decided to proceed after carefully measuring the circumstances against the two standards that I believe govern that decision. Those standards are the ones in the Justice Department's basic regulations governing disqualification of all Department officers and employees, and the ones in the American Bar Association's Rules of Professional Conduct for all lawyers. In my view, these two standards are consistent, they are appropriate to the recusal decision, and they are adequate.

The departmental regulations prohibit the Attorney General from participating in a criminal investigation if he has a "personal" or "political" relationship with any person or organization that is either "substantially involved" in the conduct that is the subject of the investigation or

prosecution, or that has a "specific and substantial interest" that would be "directly affected" by its outcome. According to the regulations, a "political relationship" exists where the Attorney General has a "close identification" with an elected official, a candidate for public office, a political party or a campaign organization. A "personal relationship" is a "close and substantial connection" of the type "normally viewed as likely to induce partiality," including familial relationships as well as friendships. Whether the relationship is "personal" is to be judged "on an individual basis with due regard" given to the Attorney General's "subjective opinion." The departmental regulations also prohibit the Attorney General from participating in any matter in which he has a financial interest due to a personal, familial, professional or business relationship.

There is one procedural respect in which the regulations do not fit the Attorney General. They require that an employee who believes he or she is subject to disqualification should report the matter and its attendant facts and circumstances to the appropriate supervisor or department head, who will then determine whether the employee should be recused. To whom, we might ask, should the Attorney General report the matter? Putting aside the President, of course, the Attorney General has no supervisor or department head. This procedural gap in the regulations should not give us great pause. Any Attorney General is more than competent to

resolve the recusal issue on his own. Indeed, it is the same type of issue that members of the Bar often confront as they determine whether to undertake a particular representation.

This brings us to what I consider to be the second source of recusal standards. As a member of the Bar, the Attorney General must comply with the prevailing rules of professional conduct. Under the American Bar Association's Model Rules, the Attorney General should not represent his client -- the United States -- if that representation may be "materially limited" by his responsibilities to a third person or by his own interests unless he reasonably believes that his representation of the government will not be adversely affected.

To state the standards, of course, is only half the answer. The other half - and the more difficult part - is how to apply them in given situations. Some would no doubt contend that an Attorney General is likely to have either a personal or a political relationship with many, if not most, of the officials expressly covered by the independent counsel provisions of the Ethics in Government Act, or that his own interests as a member of the same administration or political party would be adversely affected by the investigation and prosecution of any of them. Under that view, the Attorney General should frequently recuse himself.

I do not subscribe to that view. The independent counsel mechanism is extraordinary, born of crisis experience.

The judgment on whether to invoke it, within the standards of the statute, is a special one, and, in the end, one that can be resolved only on a case-by-case basis. In each situation, the facts and circumstances, as history has shown, are likely to be unique. That, of course, is why the utmost care must be exercised. In my view, in the vast majority of imaginable cases, the Attorney General is the appropriate person to make that judgment. He should seldom recuse himself.

The standards I have articulated should not, in my view, be legislated into the text of the Act, because to do so would invite litigation over recusal. Such litigation, I fear, would eventually accompany many of the preliminary investigations carried out by the Attorney General, and would divert the attention of all concerned parties, as well as the public, from the merits of the particular matter at hand. If an Attorney General is suspected of abusing the power of preliminary investigation when he should have recused himself, Congress has the oversight power and the ultimate power of impeachment as a corrective.

Turning from recusal to the Act in general, there are five key areas that I regard as the heart of the statute. I urge the Committee to focus upon them in its deliberations.

First, I believe that the mechanism in the Act through which the independent counsel is appointed can and should easily withstand constitutional scrutiny. In my view, the independent counsel is an executive branch official. I am

aware of nothing in either the text of the Constitution or in settled principles of jurisprudence that would require the appointment of an executive branch official to be made in every instance by the executive. In fact, the Appointment Clause of the Constitution (Art. II, §2, cl. 2) expressly vests in the "Courts of Law" the power to appoint inferior officers. And it has been established at least since 1880 (Ex Parte Siebold, 100 U.S. 371 (1880)), that inferior officers appointed by the courts could exercise executive functions.

In the end, any constitutional challenge to the appointment mechanism will founder on one irrefutable fact -- there is no good alternative. The concept of an independent counsel has become generally accepted because of a perception that the Attorney General, a presidentially appointed official, cannot always be relied upon to enforce the criminal law impartially against those in the highest offices of the Government. My personal view, as a former Attorney General and a subordinate Justice Department official under another Attorney General, is that the underlying perception is wrong: the Justice Department can and should be trusted to investigate and prosecute anyone, no matter what his or her office is. But given the perception, the power to appoint the independent counsel should reside, in the first instance, outside the Executive Branch, or else the same perception that now disqualifies the Justice Department would also attach to the independent counsel. The appointment power cannot rest with

Congress: the Constitutional text does not support its residing there, and vesting the power in Congress could turn the appointment of an independent counsel into a partisan effort. The appointment power should stay in the special court, exercisable pursuant to the existing mechanism.

I believe the Congress should seriously consider reducing the number of, or redefining, the categories of persons with respect to whom the appointment of an independent counsel is mandatory. The existing mechanism for defining coverage within the White House -- based on salary level -- sweeps in too many persons. The Justice Department should be able to investigate many of those persons without there arising any perception of partiality. Similarly, I do believe such a perception would arise if the power to investigate most Cabinet-level officials were returned to the Department. I believe very strongly that an independent counsel should be absolutely required only with respect to the President, the Vice-President, those Cabinet-level or other officials who serve with the Attorney General on the National Security Council, and high-ranking Justice Department employees. Everyone else should fall within the conflict-of-interest provision in the Act, to be applied case-by-case.

The third issue I would like to touch upon is the expansion of an independent counsel's jurisdiction once his investigation is underway. Theoretically, when the independent counsel obtains information that could call for an expansion of

his jurisdiction -- either by subject matter or by individual -- he should follow the same procedure that applied to the original investigation. That is, he should submit the new information to the Attorney General, who would initiate a new "preliminary investigation" to determine whether to recommend the enlargement of the independent counsel's jurisdiction. In practice, however, efficiency requires a quicker mechanism than theory alone would permit. Something akin to the current system, in which the independent counsel applies to the Attorney General or directly to the court for additional jurisdiction, is essential. But this departure from the theoretically pure model creates a serious potential problem: an ever-expanding, all-consuming independent counsel's office which could develop, over time, into a second Justice Department. With each new allegation or new subject of investigation would come additional staff, additional investment of funds and a lengthening of the original investigation. Where and with whom is such a process to stop?

This potential for unchecked expansion and consequent delay merits your closest attention in considering re-authorization of the Act. It is at this pressure point, I believe, that the entire independent counsel construct could founder, both politically and constitutionally. Politically, the office would not survive the first example of a rogue counsel who returned to the court again and again until virtually an entire Administration was under his jurisdiction.

Constitutionally, the courts, even now, I submit, will closely scrutinize a mechanism that allows for that possibility. My own view is that the best prophylactic, both politically and constitutionally, is to require the independent counsel in all instances to obtain the Justice Department's support for an expansion of his jurisdiction. The check on any abuse of that system by the Department would be that the independent counsel could always invoke the original appointment machinery by submitting his information to the Department for a preliminary investigation.

A fourth issue is the removal of the independent counsel. Under the present Act, the independent counsel may be removed, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical or mental disability, or any other condition that substantially impairs the performance of his or her duties. Once removed, the independent counsel may seek judicial review and can obtain reinstatement upon a showing that the removal was based on "an error of law or fact."

I believe that consideration should be given to eliminating the independent counsel's right to seek such judicial review. No other executive officer is provided with such a right, and the independent counsel does not, in my view, stand on such a different plane as to have it bestowed upon him or her alone. The judicial review provision also raises an unnecessary constitutional issue. I believe that political

realities will ensure that the removal of an independent counsel, should one occur, will be more than adequately supported.

Finally, I cannot emphasize enough the need to retain the Act's requirement that the independent counsel, wherever possible, "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." Indeed, the independent counsel should be encouraged to ascertain departmental policy in cases similar to the one under investigation. This is consistent, of course, with the independent counsel's status as an executive officer and his authorization to exercise all investigative and prosecutorial functions and powers of a Justice Department officer. Compliance with existing policies and procedures is essential because, in the end, an independent counsel is appointed not to change rules of decision, but to change decision-makers. The touchstone of the independent counsel is the exercise of independent judgment, not the exercise of independent policies and procedures.

I thank the Committee for providing me with the opportunity to testify today. I welcome any questions.

7025w

For Release Expected at 9:30 A.M. EST.

March 20, 1987

STATEMENT OF
DAVID H. MARTIN
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

BEFORE
THE SUBCOMMITTEE ON OVERSIGHT
OF GOVERNMENT MANAGEMENT
OF
THE SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

ON

Title VI of the Ethics in Government Act, 28 U.S.C. §591-98, governing the appointment of independent counsel, for purposes of its reauthorization and possible amendment.

March 20, 1987

Mr. Chairman and Members of The Subcommittee:

I appreciate your invitation to appear before this subcommittee to present the views of the Office of Government Ethics (OGE) on the Attorney General's recusal from Title VI cases of the Ethics in Government Act of 1978 and the standards of conduct applicable to the independent counsel. Specifically, you ask that we address the following issues:

What standards, if any, currently govern an Attorney General's decision to recuse himself from a case under Title VI?

Is the Attorney General bound by the Department of Justice regulations on recusal, codified at 28 C.F.R. §§45.735-4 and 5, and do these regulations apply to Title VI cases?

What standards of conduct apply to independent counsel and their staffs? Are they bound by the Department of Justice's regulations on standards of conduct, codified at 28 C.F.R. §45.735?

Are any standards of conduct violated by an attorney who serves both as an independent counsel in an ongoing investigation and as counsel:

- a. to the target of a separate independent counsel investigation; or
- b. to parties in litigation with the United States in a criminal or civil matter?

Your staff has advised that you are particularly interested in the disqualification aspects of the Attorney General's involvement regarding allegations against the United States Ambassador to Switzerland, Faith Ryan Whittlesey.

Your questions raise matters which this Office has not had occasion to address in the past. Title VI of the Ethics in Government Act, codified at 28 U.S.C. §§591-598, authorizes the appointment of an independent counsel to investigate allegations of criminal activity by named high-ranking executive branch officials. A brief description of the provisions of this law follows.

The Attorney General is required to conduct an investigation whenever he "...receives information sufficient to constitute grounds to investigate that any of the [named high-ranking executive branch officials] have committed a violation of Federal criminal law other than a violation constituting a petty offense." Upon completion of this preliminary investigation, the Attorney General shall notify the appropriate United States Court of Appeals either that there are no reasonable grounds to investigate further or, alternatively, that he is applying for the appointment of an independent counsel to conduct further investigation. Upon receipt of such an application, the court shall appoint an independent counsel and shall define that counsel's prosecutorial jurisdiction. The appointed independent counsel shall have the "... full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice...", with respect to all matters within his prosecutorial jurisdiction.

Additionally, §603 of the Ethics Act provides that the Attorney General shall provide regulations "...which require the disqualification of any officer or employee of the Department of Justice ... from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof."

Interestingly and unfortunately, none of the provisions of this chapter nor the legislative history of the Act address either the standards applicable for the disqualification of the Attorney General, because of any actual or apparent conflict of interest, or the role of the court, if any, to review any disqualification.

Normally, all of the standards of conduct regulations of the Department of Justice are applicable to the Attorney General. The preamble on purpose and scope prescribing policies, standards and instructions with regard to the conduct and behavior of Department of Justice employees states that the standards have been promulgated in conformity with Executive Order No. 11222 of May 8, 1965 relating to conflicts of interest and ethical standards of behavior for all officers and employees of the executive branch. Moreover, the definitional provisions of the Department of Justice regulations specifically deem Presidential appointees as employees for purposes of the standard of conduct regulations. It follows that it is reasonable to conclude that the disqualification provisions (28 C.F.R. §§45.735-4 and 5) apply to the Attorney General as well as all other officers and employees of the Department of Justice. However, a review of the legislative history surrounding the purpose for enactment of the original independent counsel provisions of Title VI of the Ethics in Government Act suggests that standards of conduct regulations standing alone are not dispositive of the issues you raise.

It appears that in 1978, in its original deliberations on the mechanics involved in the creation of an independent counsel, the Senate envisioned that the disqualification provisions of 28 U.S.C. §528 would result in the promulgation of rules and regulations that were applicable to all Department of Justice cases. Presumably, the current provisions on disqualification in the Department of Justice regulations meet those requirements, as well

as the requirements contained in other conflict of interest statutes, such as 18 U.S.C. §208. However, in the same deliberations, the Senate seemed to be suggesting that because of certain inherent institutional conflicts on the part of the President and the Attorney General, a different type of disqualification mechanism was necessary. This proposition is based on the following consideration:

The Attorney General and his principal assistants are appointees of the President and members of an elected administration. It is a conflict of interest for them to investigate their own campaign or, thereafter, any allegations of criminal wrongdoing by high-level officials of the executive branch. The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Having men of integrity operate in the face of a conflict is an insufficient protection for a system of justice.

Because of the very language of the Act and the specific steps it requires, we believe that in most instances the Attorney General must act in order to carry out the apparent intent and logic of the concept of institutional conflict of interest. Furthermore the positions identified in §591 to whom the independent counsel provisions automatically apply, such as the President and Assistant Attorneys General, are not only self evident of an institutional conflict, but by any logical and practical test must contain a personal and/or political conflict of interest as well. The President appoints the Attorney General not only for expertise in the legal field, but also for reasons of a practical political and policy nature. The same holds true for Assistant Attorneys General. In fact, almost any individual holding a high level position in the executive branch will in varying degrees be known by the Attorney General either in a political or personal fashion. We, therefore, conclude that a normal objective standard for disqualification should not apply to the Attorney General in implementing the administrative scheme of the independent counsel provisions of the Ethics Act. Generally, a federal employee should disqualify himself when there is a reasonable basis to question his impartiality. However, based on our

analysis of the independent counsel provisions, a less restrictive standard applies, requiring the Attorney General to disqualify himself only when he has a substantial pecuniary or beneficial relationship with the subject of the inquiry. This test, we feel, must involve a weighing of all the circumstances and a subjective judgment by the Attorney General. We, therefore, see very few situations in which the Attorney General would disqualify himself.

We were uncertain as to what the Congress had in mind on this point, or even the standard utilized by the Attorney General. Consequently, shortly after the release of the Attorney General's report to the court in December 1986, concerning allegations against Ambassador Whittlesey, we contacted the Office of Professional Responsibility at the Department of Justice. We inquired whether any determinations pursuant to 28 CFR \$45.734-4 or 28 U.S.C. \$528 were made regarding a personal or political conflict of interest, or the appearance thereof, based either on Attorney General Meese's prior professional relationship with Ambassador Whittlesey, or the allegation that an expenditure from Ambassador Whittlesey's gift fund was for the benefit of the Attorney General and his staff. If such documentation did exist, we asked to be provided with copies, as well as any background information raised in developing the necessary findings. On February 20, 1987, the Office of Professional Responsibility advised my Office in writing that they had initiated a review throughout the various Department of Justice components that were, or may have been, involved in the matter. To date, we have not received their analysis.

Full disclosure of facts generally enhances the appearance as well as the integrity of governmental processes. Therefore, the Office of Government Ethics recommends the following for the subcommittee's consideration. Notwithstanding any argument about the

legal necessity for the Attorney General's disqualification, a mechanism should be established which specifically addresses the manner in which the Attorney General handles personal recusal issues. This might include a factual account by the Attorney General setting forth the reasons for continuing to serve when, under the circumstances, there might be a reasonable factual basis for doubting his impartiality. When possible, the disqualification assessment should be made public.

STATUS OF INDEPENDENT COUNSEL

Frequently independent counsel have sought advice from this Office, with questions focused on issues surrounding the recruitment of assistant prosecutors. Of specific concern were the part-time nature of the assignment and the ability of young assistants to carry on a meaningful law practice within the constraints of the conflict of interest laws.

In April 1984, in answer to an inquiry from independent counsel Jacob Stein, our Office concluded that for purposes of interpreting the restrictions on representational activities on the part of special Government employees under the provisions of 18 U.S.C. §203 and §205, we would construe the independent counsels as being part of the Department of Justice. We further concluded that a matter is not regarded as pending in the Department of Justice for purposes of the criminal restrictions if it is within the jurisdiction of a court. Thus, if an information or indictment has been filed in a criminal case or a complaint has been filed in a civil case, the matter is no longer pending in the Justice Department. Conflict of interest prohibitions would only apply to a grand jury or investigations or discussions within the Department of Justice prior to the filing of an information or indictment in a criminal case and to administrative and civil matters pending in the Department prior to the filing of a law suit.

A special Government employee is defined in 18 U.S.C. §202 as an officer or employee who is employed to perform temporary duties for a period not to exceed one hundred and thirty days, during any period of three hundred and sixty-five consecutive days. 18 U.S.C. §203 prohibits special Government employees who serve more than 60 days within a department from receiving compensation from representing any person other than the United States on a particular matter involving a specific party which is pending in the Department in which he serves.

We construed the independent counsels' office as being located within the Department of Justice based upon our internal reading of sections 594 and 596 of Title VI, which relate to the authority of the independent counsel and the procedure for their removal. It is my understanding that the advice to Mr. Stein was informally coordinated with the Office of Legal Counsel, Department of Justice. However, our records contain no formal written concurrence by the Department of Justice on this matter.

Subsequent to the rendering of the opinion discussed above, we have advised other independent counsel as well as their assistants that they should review the standard of conduct regulations applicable to special Government employees of the Department of Justice and the applicable rules of professional conduct once they decide to serve in a position pursuant to Title VI.

On July 2, 1986, in the matter involving the appointment of Mr. Seymour as independent counsel, and previously on June 18, 1986, in the matter of the appointment of Ms. Morrison as independent counsel, the United States Court of Appeals for the District of Columbia Circuit entered an order that the parties were designated and classified as special Government employees of the Office of Independent Counsel as a separate special

agency and that the parties were not to be considered employees of or subject to the supervision or control of the Department of Justice for any purpose, including the provisions of 18 U.S.C. §203(e) or §205. Since those rulings by the court, the issues which you raise have been clouded.

Independent Counsels and their staff should be subject to a prescribed set of standards of conduct regulations, including provisions covering the completion and filing of public or confidential financial disclosure reports. I strongly recommend that your subcommittee address this matter and unequivocally make determinations on whether or not the independent counsel and his staff should be located within the Department of Justice, or should be considered as a separate executive branch agency. In view of the criminal restrictions imposed on outside representational activities of Government attorneys, you should weigh the practical problems which accompany the status of a temporary government employee.

Notwithstanding the confusion which seems to surround the question of applicability of standards of conduct, there is no question that the rules of professional conduct of the American Bar Association apply to the independent counsels and their professional staffs.

The Senate in its deliberations in 1978 prior to the passage of the Ethics in Government Act put this matter in its proper perspective by concluding that:

It is a basic tenet of our legal system that a lawyer cannot act in a situation where he has a conflict of interest or the appearance thereof. This is not a question of the integrity of the individual. In situations where men of integrity find they have a conflict of interest - and men of integrity can have a conflict of interest - it is commonly agreed that it is their duty to disqualify themselves and have someone else undertake representation. This is done even though they may be men of such high character that they are capable of overcoming the conflict and discharging their responsibilities conscientiously. This principle is the basis of Canon 9 of the American Bar Association Code of Professional Responsibility which states that a lawyer should avoid even the appearance of impropriety.

Although these comments may have been directed to the Attorney General and his principal assistants at the time of the Senate's original deliberations, they are equally applicable to the independent counsels and their staffs.

Our Office normally does not interpret the rules of professional conduct. Therefore, we would defer to the respective bar associations for such rulings. However, it is important to point out to this subcommittee that the Preamble and Scope of the Model Rules of Professional Conduct of the American Bar Association states that the rules of conduct do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

An independent counsel's concurrent representation of defendants in unrelated civil or criminal cases may be an acceptable course of conduct. However, in view of the sensitive image considerations which surround the status of an independent counsel, it is

of the utmost importance that the independent counsel avoid participating in a case or circumstances where any implication of partiality may cast a shadow over the integrity of his office. We think that it is inappropriate when an independent counsel in one proceeding represents witnesses or the target of a separate independent counsel investigation. The special status of independent counsels suggests that there is a greater need for them to insure that their position does not appear to provide an advantage not available to others in dealing with the Department of Justice.

The Office of Government Ethics is prepared to assist the subcommittee in its deliberations regarding reauthorization of the independent counsel provision of the Ethics Act. I am pleased to respond to your questions.

STATEMENT OF

NORMAN LEFSTEIN

before the

SUBCOMMITTEE ON OVERSIGHT OF
GOVERNMENT MANAGEMENT

of the

COMMITTEE ON GOVERNMENTAL AFFAIRS

of the

UNITED STATES SENATE

on the subject of the

INDEPENDENT COUNSEL PROVISIONS
OF THE
ETHICS IN GOVERNMENT ACT

MARCH 20, 1987

I am Norman Lefstein, a professor of law at the University of North Carolina at Chapel Hill. I appear before you today to discuss the Independent Counsel provisions of the Ethics in Government Act (Title VI), 18 U.S.C., sections 591-598.

My special areas of interest are criminal law, criminal procedure, and professional responsibility. Although I am currently serving as Chairperson of the Section of Criminal Justice of the American Bar Association, I am appearing before the Subcommittee in my personal capacity. The opinions expressed in this statement are my own and should not be construed as the views of either the Section of Criminal Justice or of the ABA.

The Subcommittee has asked that I address a series of questions concerning recusal of the Attorney General and conflicts of interest under Title VI. I also was asked to consider whether a person serving part-time as an Independent Counsel has an ethical conflict in simultaneously representing as defense counsel the target of another Independent Counsel investigation.

I was first asked to discuss the standards, if any, that apply to an Attorney General's decision to recuse himself from a case under Title VI. Although comprehensive rules govern the disqualification of Justice Department employees, these

rules do not appear to apply to the Attorney General.

Pursuant to 28 U.S.C., section 528, the Attorney General is required to "promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice...from a particular investigation or prosecution if such participation may result in a personal, financial or political conflict of interest, or the appearance thereof." In response to this statute, detailed regulations have been issued governing the disqualification of Justice Department employees. 20 CFR, section 45.735-4 (pertaining to "personal and political relationships") and section 45.735-5 (pertaining to "financial interests").

According to section 45.735-4, an employee has a "personal or political relationship with:

- (1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or
- (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution."

The regulations further provide that when an employee believes that he or she comes within the above provisions, the matter must be reported to an appropriate "supervisor," who must relieve the employee from participation in the case unless "he determines...in writing, after full consideration of the facts and circumstances, that

- (1) The relationship will not have the effect of rendering the employee's service less than

fully impartial and professional, and

- (2) The employee's participation would not create an appearance of a conflict likely to affect the public perception of the integrity of the investigation or prosecution."

Section 45.735-3 defines "employee" as including an "officer...of the Department of Justice" and "Presidential appointees."

Despite the reference to Presidential appointees, it appears that the regulations were not intended to apply to the Attorney General. Employees who believe that they have a conflict of interest are required to notify their Department of Justice supervisors, but the regulations are silent about what the Attorney General should do if he believes that he has a conflict of interest. Indeed, except for the Attorney General, the regulations are quite explicit about how they apply to Justice Department officials. Section 45.735-3 provides, for example, that "an employee who is the head of a division or who is an appointee of the Attorney General not assigned to a division shall report to, or seek approval from the Deputy Attorney General, and the Deputy Attorney General shall report to, or seek approval from the Attorney General."

Regardless of whether the current Department of Justice regulations apply to the Attorney General, it is important to consider the standards that should apply to an Attorney General's recusal decision under Title VI. In my judgment, the Attorney General should recuse himself when, as stated in 28

CFR, section 45.735-4 (c)(2), he has a "personal relationship" with the "subject of the investigation" that constitutes a "close and substantial connection of the type normally viewed as likely to induce partiality." I also agree with the statement in this section that whether relationships are "'personal' must be judged on an individual basis with due regard given to the subjective opinion of the employee." In addition, the Attorney General obviously should recuse himself in Title VI cases if he has a "financial" conflict of interest.

The more difficult question is whether the Attorney General should be required to disqualify himself when a "political relationship" is present. "Political relationship" is defined by section 45.735-4 as "a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof." For the reasons explained below, I believe that if the Independent Counsel provisions of the Ethics in Government Act are to be retained, it does not make sense to require that the Attorney General, for political reasons, disqualify himself from conducting "preliminary investigations." I reach this conclusion with some reluctance because I believe that the Attorney General normally has a conflict of interest in conducting such investigations pursuant to Title VI. On the other hand, if

the Attorney General must routinely recuse himself for political reasons, the Independent Counsel statute will not operate in the manner that Congress intended.

Consider the result if the standards contained in 28 CFR 45.735-4 were applied to the Attorney General. According to this section, disqualification is required by virtue of political relationships unless it is determined that an "employee's participation would not create an appearance of a conflict of interest likely to affect the public perception of the integrity of the investigation or prosecution." In the case of the Attorney General, this is a test that can hardly ever be satisfied. Because the Attorney General is almost always a close political ally of the President and has strong ties to the political party in office, a "political relationship" is usually present in Title VI cases; the Attorney General's participation, therefore, "create[s] an appearance of a conflict interest likely to affect the public perception of the integrity of the investigation...." This proposition is supported by the American Bar Association Standards Relating to the Prosecution Function, which recommend in standard 3-1.2 that "[a] prosecutor should avoid the appearance or reality of a conflict of interest with respect to official duties." The commentary to this provision explains "that the prosecutor [should] avoid participation in a case in circumstances where any implication of partiality may cast a shadow over the integrity of the office."

Obviously, these principles are fully applicable during preliminary criminal investigations, just as they should be applied once a decision to prosecute has been made.

It is worth remembering that the Independent Counsel statute is predicated on the principle that when the persons identified in section 591 are the targets of a criminal investigation, the Attorney General has an inherent institutional conflict of interest in taking the case beyond a preliminary investigation. Even if the Attorney General or other high-ranking Presidential employees of the Justice Department can actually discharge their responsibilities unaffected by loyalties to other persons or allegiance to their political party, the statute calls for an Independent Counsel so that the public can have confidence in the integrity of the process. But if there is a conflict of interest in the event of prosecution, there is similarly a conflict of interest in the Attorney General either deciding not to conduct a preliminary investigation or in conducting one. In short, if an Independent Counsel is necessary in order to prosecute a case for which the Attorney General would otherwise have a conflict of interest, the Attorney General necessarily has a conflict in deciding whether the case must be turned over to an Independent Counsel. By enacting Title VI, however, Congress implicitly has declared that we can live with the latter conflict because it is one that endures only

during a preliminary investigation and at most for ninety days.

Admittedly, not all cases arising under Title VI involve the same kinds of political relationships for the Attorney General. An investigation of an Assistant Attorney General, for example, seemingly involves a closer political relationship and hence a greater conflict of interest than does the investigation of an Ambassador. But regardless of the degree, virtually all of the cases that arise under Title VI involve political implications for the Attorney General, and virtually all of them are embarrassing to the Administration that occupies the White House. As a result, I doubt that it is possible to draft meaningful standards to guide an Attorney General in deciding whether to recuse himself because of a political conflict of interest.

Unfortunately, the importance of the Attorney General's conflict in making preliminary investigations has been heightened due to the statute's amendment in 1982. Before 1982, the Attorney General was required to ask for a special prosecutor unless he concluded that the charges "were so unsubstantiated that no further investigation or prosecution was warranted." The amendment to Title VI enlarged the Attorney General's discretion, so that now an Independent Counsel does not have to be requested if the Attorney General finds that there are no "reasonable grounds to believe that further investigation or prosecution is warranted...."

Section 592 (b)(1).

Prior to the 1982 amendment, there was concern that the Attorney General had too little discretion to avoid asking for a special prosecutor. Now that the statute has been amended and the Attorney General given greater discretion to decide whether an Independent Counsel should be requested, there is apparently concern that the statute affords the Attorney General too much discretion. Of course, if the Attorney General decides always to ask for the appointment of an Independent Counsel, his political conflict of interest during the preliminary investigation is largely academic. It is primarily when an Independent Counsel is not requested that the Attorney General's conflict becomes important, since the target of the investigation has been cleared by someone whose impartiality may be questioned and the public cannot be sure whether an independent investigator would have reached the same result.

The foregoing analysis suggests that disqualification of the Attorney General for political reasons sweeps too broadly, requiring that the Attorney General remove himself from virtually all cases involving the need for a preliminary investigation. Thus, the question is whether any safeguard can be devised to deal with the situation where the Attorney General conducts a preliminary investigation and refuses to ask for the appointment of an Independent Counsel. While there undoubtedly are other alternatives, I recommend that the

Subcommittee consider an amendment to Title VI that would require appointment of a Special Examiner to review all cases in which an Independent Counsel is not requested by the Attorney General. The review would be undertaken based solely upon the record compiled by the Department of Justice and its sole purpose would be to assure the appropriateness of the Attorney General's decision. Appointment of the Special Examiner would be by the Division of the Court which now appoints the Independent Counsel and would be automatic in all cases in which the Attorney General conducts a preliminary investigation and does not seek the appointment of an Independent Counsel. In the vast majority of these cases, the Special Examiner will undoubtedly concur in the Attorney General's judgment. In the event the Special Examiner disagrees with the Attorney General's decision, the appointment of an Independent Counsel would be required.

There are several important advantages of the proposed procedure. First, the discretion currently available to the Attorney General to conduct preliminary investigations would be retained, thus avoiding the kinds of situations that arose prior to 1983, where the Attorney General believed he was required to ask for the appointment of a Special Prosecutor even though he believed that a successful prosecution could never ultimately be maintained. On the other hand, whenever the Attorney General decides after a preliminary investigation not to ask for the appointment of an Independent Counsel, the

decision will be reviewed by a person whose independence is unquestioned. In this way, the public can be assured that serious wrongdoing has not been concealed for partisan political reasons.

I was also asked to consider who should assume responsibility in cases under Title VI where the Attorney General recuses himself. As the foregoing discussion indicates, I believe it is sensible to require that the Attorney General recuse himself for "personal" or "financial" reasons. In the Deaver and Nofziger cases in which Attorney General Meese did recuse himself, the Deputy Attorney General took his place. Assuming that these recusals were due to long-time personal friendships between the Attorney General and the targets of the investigations, I believe it was a reasonable decision to substitute the Deputy Attorney General. Admittedly, there are instances where courts have disqualified an entire prosecutor's office where a single prosecutor has had a conflict of interest, but such orders are by no means routine. The ABA's Model Rules of Professional Conduct recognize, moreover, that disqualification of a lawyer in a government agency does not necessarily require disqualification of all of the lawyers in the agency. Model Rule 1.11 (c) and comment in paragraph 9. Nevertheless, because the Deputy Attorney General is answerable to the Attorney General and great sensitivity surrounds a preliminary investigation under Title VI, it might be preferable to devise

a different arrangement for handling cases in which the Attorney General has a conflict of interest. Assignment of the preliminary investigation to the United States Attorney for the District of Columbia, for example, might be preferable, since the matter would no longer be lodged with a person who was dealing with the Attorney General on a daily basis.

In addition, the Subcommittee asked whether I agreed with the Attorney General's decisions respecting recusal in the cases of Deaver, Nofziger, Olson, Schmults, Dinkins, Whittlesey, and in the Iran/Contra matter. Arguably, in all of these cases the Attorney General had a political relationship with the targets of the investigations and should therefore have been required to recuse himself. As my earlier comments indicate, however, I do not think it makes sense for the Attorney General to recuse himself for political reasons, since such a recusal standard would mean that the Attorney General would rarely be able to participate in a preliminary investigation involving potential targets covered by Title VI. Moreover, if the recusal were to be based on a political relationship between the Attorney General and the target, the chances are that neither the Deputy Attorney General nor other Presidential appointees of the Department of Justice would be free to undertake a conflict-free investigation. In any event, there is simply insufficient information available to analyze the appropriateness of the

Attorney General's decisions concerning recusal in the above cases. The memoranda filed with the Division of the Court in these cases do not contain any discussion of the recusal issue. Public confidence in the process might thus be enhanced by requiring that the Attorney General explain either why he has recused himself or remained in a case where issues of personal or financial conflict of interest have been raised.

Finally, I was asked by the Subcommittee to consider whether an attorney who is serving as an Independent Counsel in an ongoing investigation may also serve simultaneously as defense counsel to the target of a separate Independent Counsel investigation. In situations of this kind, the controlling ethical principles relate to confidentiality and "divided loyalties."

First, there has to be concern about the possibility that confidential information learned in the case in which the lawyer is serving as defense counsel might be relevant to the case in which the lawyer is serving as Independent Counsel. Conversely, is there any risk that information learned while serving as Independent Counsel might be helpful in the case that the lawyer is defending? If there is a substantial relationship between the two cases involved, so that confidential information learned in one of the cases might potentially be used in the other, the lawyer should not serve as both defense counsel and Independent Counsel.

In addition, a lawyer who serves in the dual roles of defense lawyer and Independent Counsel may have conflicting loyalties. The Model Rules of Professional Conduct (Rule 1.7) codify the well accepted principle that representation of a client should be declined "if the representation of that client may be materially limited by the lawyer's responsibilities to another client...." A lawyer who is serving as both an Independent Counsel and defense attorney may well have divided loyalties. Consider the dilemma for the Independent Counsel/defense lawyer if the target of an investigation wants the lawyer to challenge the constitutionality of the Independent Counsel legislation; as Independent Counsel, this same lawyer would presumably not want to see such a lawsuit filed and, if it were begun, there would be a clear duty to resist the challenge.

PREPARED TESTIMONY OF THOMAS D. MORGAN
PROFESSOR OF LAW, EMORY UNIVERSITY
BEFORE THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT
MANAGEMENT, COMMITTEE ON GOVERNMENTAL AFFAIRS,
UNITED STATES SENATE, MARCH 20, 1987.

Mr. Chairman and Members of the Subcommittee:

I appreciate the invitation of the Subcommittee to testify as to conflict of interest questions presented by the appointment and use of independent counsel in cases involving high-ranking executive branch officials pursuant to Title VI of the Ethics in Government Act, 28 U.S.C. Sec. 591-98.

The use of independent counsel in such sensitive cases has become, over the last ten to fifteen years, an important part of permitting the business of the nation to continue in the face of allegations of wrongdoing by executive branch officials. It has become a way to assure all citizens both that the full story will be told in each case and that no person will be treated as above the law.

While the examples of the use of independent counsel on which I have been asked to comment are primarily from the present administration, the use of independent counsel has and clearly will transcend party lines. My testimony has been requested primarily with respect to the proper action of Attorneys General of any party and any administration and

what I say should not be taken as special commentary on the actions of the incumbent Attorney General.

I have been asked to address two kinds of questions. The first relate to circumstances under which the Attorney General must or should recuse himself from investigating whether a matter should be referred to independent counsel. The second relate to conflicts of interest which may be faced by those persons who serve in the role of independent counsel. I will address the questions in order.

1. What standards, if any, currently govern an Attorney General's decision to recuse himself from a case under Title VI?

No special standards seem to govern such a recusal today. 28 U.S.C. Sec. 591 is clear that "the Attorney General" is the one who "shall" investigate whenever he receives information suggesting a possible violation of a non-petty Federal criminal law by one of the described executive branch officials covered by the statute. Section 591 itself makes no provision for the Attorney General's abdicating ultimate decision making responsibility to another official by reason of ethical requirements or for any other reason.

For such delegation authority, one must turn to 28 U.S.C. Sec. 510 which allows the Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the

Department of Justice of any function of the Attorney General."

In addition, 28 U.S.C. Sec. 528 mandates the Attorney General to "promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof." (Emphasis added).

Pursuant thereto, the Attorney General has issued Justice Department regulations such as 28 CFR Part 45. Under Sec. 45.735-4, for example, no Justice Department "employee" (defined in sec. 45.735-3 to include political appointees) may "participate in a criminal investigation" if he or she has a "personal or political relationship" with either the target of the investigation or "any person or organization that would be directly affected by the outcome of the investigation or prosecution." Section 45.735-5 extends the disqualification to cases involving the attorney's private financial interests.

The statutes and regulations on disqualification for conflicts of interest seem to cover the Attorney General by their terms, but I would respectfully suggest that they are not very helpful as to when recusal is appropriate in the kinds of investigations from which the appointment of

independent counsel may result. The regulations, in particular, are clearly designed for routine cases and for officials below the Attorney General.

First, 28 C.F.R. Sec. 45.735-4(b) directs the possibly disqualified lawyer to report the "matter and all attendant facts and circumstances to his supervisor at the level of section chief or the equivalent or higher". For the Attorney General, of course, the only such "superior" would be the President himself.

Further, it is almost inconceivable that there could be a case for which independent counsel might be appropriate as to which the Attorney General would not have at least a "political" relationship with the official under investigation. Likewise, the President would almost certainly be "directly affected by the outcome" of any such investigation as well -- a second ground for the Attorney General's disqualification and one as to which a "report" to the President would seem doubly inappropriate.

By its terms, then, 28 C.F.R. Sec. 45.735-4 does not exclude the Attorney General, but neither it nor any other regulation establishes a practical procedure for handling recusal in the kinds of cases this subcommittee is considering.

2. What standards could or should govern an Attorney General's recusal from a case under Title VI, and should they be included in the text of Title VI?

I respectfully suggest that trying to develop standards for recusal of the Attorney General is likely to prove unproductive until a contradiction inherent in the present statute is itself resolved. By all reasonable standards of conflict of interest, if a case is one as to which the Attorney General's apparent interest requires that independent counsel be appointed, the same apparent interest should prevent the Attorney General's making the decision to refer or not refer the case for appointment of such counsel.

There are presumably two reasons why appointment of independent counsel has come to be so widely recognized as a desirable way to handle sensitive cases involving high-level public officials. First, such an appointment protects the public by providing assurance that the investigation "gets to the bottom of things". But second and equally important, it relieves an honorable Attorney General of the inevitable speculation and suspicion that he might have pulled punches on behalf of a political ally or personal friend.

It is, of course, important not to appoint an independent counsel every time there is the least whiff of scandal. Talk is cheap and rumors even cheaper. Some prior screening of cases, such as that now assigned to the Attorney General, is important both to protect the clearly innocent and to save the cost and dislocation caused by creation of an independent counsel's office. Both concerns which dictate that the Attorney General should not prosecute cases involving his fellow high-level officials, however,

also suggest that it should not be the Attorney General who decides that independent counsel is not needed.

Attorney General determinations not to refer a case to independent counsel follow the same basic four-step format. A charge is first described. Then, a reasonably convincing factual basis for the charge is developed. Next, the factual basis is concluded to be ambiguous and the difficulty of proving the charged official's criminal intent is asserted. Finally, the finding that no independent counsel need be appointed is made.

I am not suggesting that the determinations I have reviewed are ones that the Attorney General has made improperly. It is simply that one can not tell. One need not question the integrity of the Attorney General to say that his conclusion that no case can be made against an official will almost inevitably be unsatisfying. It is always hard to prove a negative conclusion. Concerns that the investigation was not sufficiently in depth or that the Attorney General accepted as true what an independent counsel would have challenged are as present at the investigation stage as they would be in an actual prosecution.

If verbal standards for recusal of the Attorney General are required, I believe the "personal, financial or political" standard quoted earlier from 28 U.S.C. Sec. 528 is as good as any. Because it is already part of the "Attorney General" provisions of the United States Code, it probably need not be repeated in the Ethics in Government

Act. However, as suggested above, it will be such a rare case in which such a relationship between the Attorney General and the accused does not exist in these cases, that I believe that someone other than the Attorney General should be given primary responsibility for the initial investigation.

3. In the event of an Attorney General's recusal from a Title VI case, who should assume decisionmaking authority and how should that person be selected?

In light of my answer to the previous question, I will respectfully answer this one by suggesting three persons other than the Attorney General in whom the duty to conduct the initial investigation might be lodged. By implication, they are also persons who might act in the case of the Attorney General's recusal.

First would be the Deputy Attorney General. Traditionally the alter ego of the Attorney General, placing the responsibility in this individual would minimize the appearance of not trusting the Department of Justice, while transferring the investigation responsibilities to someone who is usually somewhat less likely to have close personal or political relationships to the persons under investigation.

Second would be the Assistant Attorney General, Criminal Division. This is an office staffed with persons with the experience and prosecutorial judgment to conduct a criminal investigation and to determine what can and cannot

be proved. The Assistant Attorney General is also a person typically appointed with less of an eye on political relationships than is true for either the Attorney General or his Deputy. While an investigation conducted by anyone who reports directly to the Attorney General could be criticized on the same basis as the Attorney General's own investigation might be, moving the function to this level might add an important dimension of credibility to the decision not to refer the case to independent counsel.

Third, the investigatory responsibility could be assigned to the United States Attorney for the District of Columbia. The court which appoints independent counsel under present law is, of course, a division of the Court of Appeals for the D.C. Circuit, so placing the investigatory responsibility in this U.S. Attorney has a logic of its own. In that office, once again, the potential cases could be evaluated by professionals used to proving cases before juries -- an experience often lacking in otherwise-able Attorneys General. Finally, placing the responsibility in someone outside the Main Justice building might go a long way toward assuring public acceptance of whatever decision is reached in a given case.

Each of the three suggested officials is appointed with the advice and consent of the Senate, so each incumbent is someone whose character the Senate would have had the ability to review. Further, each is a position with many other responsibilities, thus virtually assuring that no

incumbent would have been named solely for his or her likely attitude on official misconduct cases. In this respect, the proposal differs sharply from creation of a special "Office of Independent Counsel" whose institutionalization would seem to create more problems than it solves.

Finally, each is a person as to whom the Justice Department regulations on disqualification for conflict of interest would make sense. Each has a superior to whom he could report and who could direct that another perform the investigatory function in a given case.

4. Were the Attorney General's recusal decisions in the Title VI cases involving Michael K. Deaver, Franklyn C. Nofziger, Theodore Olson, Edward Schmults, Carol Dinkins, Faith Ryan Whittlesey, and the Iran/Contra matter consistent and appropriate?

This question is almost impossible to answer under the procedures presently followed. In the cases cited, Attorney General Meese recused himself in the Deaver and Nofziger cases but not the others. He gave no reason for his recusals in either case, nor was he required to do so.

Based on press accounts of Mr. Meese's relationships with the potential defendants, the recusals seem to have been based on a standard of "personal" association rather than for "political" or "financial" reasons. That is, in all of the cases, the Attorney General almost certainly had at least met all of those he was required to investigate. In

each case, what he chose to do could have political implications for the President.

As suggested earlier, none of this is a reflection on Mr. Meese; it is inherent in the process. In the language of 45 C.F.R. Sec. 45.735-4, a "'personal relationship' means a close and substantial connection of the type normally viewed as likely to induce partiality. * * * Whether relationships (including friendships) of an employee to other persons or organizations are 'personal' must be judged on an individual basis with due regard given to the subjective opinion of the employee." The only element which distinguished the cases in which Mr. Meese recused himself from those in which he did not seems to have been his assessment of the depth and duration of his prior personal associations with Mr. Deaver and Mr. Nofziger.

As suggested earlier in my testimony, I believe that both the personal and political dimensions of the Attorney General's relationships with the officials being investigated should be relevant to the propriety of his conducting the investigations. I have no basis on which to criticize Mr. Meese, given the ambiguity of the present procedures, but neither do these cases give reason to believe the system cannot be improved.

The preceeding four questions were asked by this subcommittee with respect to recusal of the Attorney General. I now turn to the second area of inquiry --

possible conflicts of interest faced by private lawyers who serve as independent counsel.

I have been asked whether any standard of conduct is violated by an attorney who serves both as an independent counsel in an ongoing investigation and as counsel:

a. to the target of a separate independent counsel investigation; or

b. to parties in litigation with the United States in a criminal or civil matter?

Here the question is whether a private attorney may represent the United States as an independent counsel while at the same time representing in other matters a party or parties whose interests are different than those of the United States.

There is little question that if the attorney represented a private client, say Acme Motors, in one case, he could not at the same time represent a client who was suing Acme Motors in even a completely unrelated matter. That ethical prohibition is not intuitively reasonable to everyone, but it is well established in the case law governing lawyers.¹ The rationale for the rule is that a lawyer owes a duty of loyalty to each of his clients and may not bite the hand that currently feeds him.

¹ The leading federal case is *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). See also, *IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978); *Grievance Committee v. Rottner*, 152 Conn. 59, 203 A.2d 82 (1964).

The question then becomes whether the fact that the attorney is acting on behalf of the government as independent counsel, rather than on behalf of a private party, should change the rule about the attorney's not suing his own client?

I believe that the government client must be considered to be somewhat different. If it were not, no attorney could afford to act as independent counsel. If the attorney and all of his or her partners and associates were barred from retaining any and all clients who had claims against the government during the period of service as independent counsel, attorneys who could afford the honor would be few indeed.

Nor does "loyalty" to the government as client, properly understood, require such behavior. There is nothing about acting as independent counsel in the Iran/Contra matter, for example, that would seem to be compromised if Mr. Walsh or his law firm, or members of his staff or their law firms, filed tax refund claims on behalf of private clients in the Federal District Court. To be sure, such claims would constitute filing suit against the government "client", but the United States government is so large and its interests are so diverse that a rule short of total disqualification from private cases against the government could and should be established.

The question should be whether the case the lawyer plans to handle against the government is of a type

sufficiently close to the one on which he is acting as independent counsel that prejudice to the government could reasonably appear to result.

Applying this test, it seems clear to me that a person acting as independent counsel in one prosecution should not act as counsel for a defendant in another case filed by an independent counsel. Even though the facts of the cases will differ, a lawyer should no more be on both sides of the independent counsel process than a state prosecutor may defend criminal cases in different jurisdictions.² The loyalties in the two roles are so different that either the loyalty to the government or the loyalty to the private client may be expected to suffer. The United States, which has an interest both in obtaining just convictions and in assuring the effective assistance of counsel to accused defendants, would be the loser whichever course the attorney chose.

In short, I believe the concern expressed by the subcommittee's question about an independent counsel's own conflicts of interest is a proper one. While there should be no requirement that the authority appointing the independent counsel receive a list of all clients represented by that counsel and his or her law firm, the appointing authority (the special division of the U.S. Court of Appeals for the

² E.g. *Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979). The issues have recently been analyzed by Professor Ronald D. Rotunda in a report for the Administrative Conference of the United States entitled "Ethical Problems in Federal Agency Hiring of Private Attorneys".

D.C. Circuit under the present statute) should be kept aware of all those cases involving federal criminal defense or claims against the United States. As to some cases, it may be possible to "screen" the independent counsel from work being done elsewhere in his or her law firm. As to other cases, however, either representation of the private client or service as independent counsel may have to be terminated.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER L. NORTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 87-457
	)	(Parker, J.)
	)	
LAWRENCE E. WALSH, <u>et al.</u> ,	)	
	)	
Defendants.	)	

MOTION OF PUBLIC CITIZEN FOR LEAVE
TO FILE BRIEF AMICUS CURIAE

Public Citizen moves this Court for leave to file the attached brief amicus curiae in support of the constitutionality of the Independent Counsel law, 28 U.S.C. §§ 591-598. Public Citizen is a nonprofit, public interest organization, founded by Ralph Nader in 1971. It is currently supported by the contributions of more than 70,000 members. Foremost among its purposes from the outset has been the assurance of government accountability, the precise purpose of the Independent Counsel law.

Public Citizen has a long history of involvement in separation of powers issues. On behalf of itself and other individuals and organizations, it has filed cases and amicus briefs in a wide variety of litigation, including the early impoundment case, such as State Highway Commission of Missouri v. Volpe, 489 F.2d 1099 (8th Cir. 1979), and Train v. City of New York, 420 U.S. 35 (1975). Its lawyers also represented the plaintiffs who successfully obtained a declaratory judgment that the firing of Archibald Cox as Special Prosecutor was unlawful,

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DISTRICT OF COLUMBIA

Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973), which was the precursor of United States v. Nixon, 418 U.S. 683 (1974).

Public Citizen's attorneys were also the lead counsel in two of the principal separation of powers cases at issue here, in which federal statutes were declared in violation of separation of powers, INS v. Chadha, 463 U.S. 919 (1983), and Bowsher v. Synar, ___U.S.____, 106 S.Ct. 2735 (1986). Its attorneys are currently litigating several other cases with major separation of powers issues in them. These include two impoundment cases, City of New Haven v. U.S.A., No. 86-5319 (D.C. Cir. Jan. 21, 1987) and Mid-Ohio Food Bank v. Ling, Civ. No. 87-252 (D.D.C.). In another case, Public Citizen v Burke, Civ. No. 86-1787 (D.D.C.), Public Citizen has challenged a rule of the National Archives that would permit President Nixon to assert executive privilege for documents in the possession of the Archives. Similarly, Public Citizen has recently intervened in Washington Legal Foundation v. Department of Justice, Civ. No. 86-2883, a challenge to the Justice Department's failure to comply with the Federal Advisory Committee Act in using the American Bar Association's Judicial Evaluation Committee. Central to the government's defense in that case is the claim that it would violate separation of powers principles for the Advisory Committee Act to apply to the Attorney General's use of the ABA Committee.

Accordingly, not only because of its expertise in the area of separation of powers, but because a ruling in this case might well have implications for other cases in which Public Citizen is

litigating similar issues, its participation as an amicus in this case is important to its interest and, we believe, will be helpful to the Court. Therefore, the motion for leave to file should be granted.

Respectfully submitted,



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Attorneys for the Amicus Curiae
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Dated: March 6, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER L. NORTH,	)	
	)	
Plaintiff,	)	
	)	Civ. No. 87-457
v.	)	(Parker, J.)
	)	
LAWRENCE E. WALSH, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM OF AMICUS CURIAE PUBLIC CITIZEN

In this action, plaintiff Oliver North contends that the Independent Counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-598, violate the constitutional principle of separation of powers. The independent counsel appointed to investigate Mr. North and others, defendant Lawrence Walsh, has argued that plaintiff's constitutional challenge should not be considered by the courts until the investigation has run its course and indictments, if any, are returned by a grand jury. We agree. However, if the Court does reach the merits of this case, it is clear that plaintiff's constitutional argument should be rejected.

In this memorandum, we will not reiterate the background of the case or the reasons why plaintiff's attack on the Independent Counsel law is premature, since those matters are fully set forth in defendant's brief. Instead, we will confine our discussion to the underlying separation of powers question. Initially, we will review the doctrine of separation of powers, as it has been analyzed by the Supreme Court. Next, we will demonstrate that there is no basis for finding that the doctrine is violated by the Independent Counsel provisions of the Ethics in Government

Act.

I. THE PRINCIPLE OF SEPARATION OF POWERS

In arguing that the Independent Counsel law offends the doctrine of separation of powers, plaintiff relies on an "archaic view of the separation of powers as requiring three airtight departments of government." Nixon v. Administrator of General Services, 433 U.S. 425, 442 (1977). In essence, plaintiff's argument is that prosecutorial functions are assigned by the Constitution to the executive branch of government and thus they are entirely immune from any form of control by Congress, even through duly enacted statutes of general applicability. But that antiquated approach to the separation of powers doctrine has been rejected by the Supreme Court as "inconsistent with the origins of that doctrine, recent decisions of the Court, and the contemporary realities of our political system." Id. at 441. Instead, the Court has developed a "pragmatic, flexible" approach which has two related themes. Id. at 442; see also United States v. Nixon, 418 U.S. 683, 707 (1974).

First, the Court has consistently guarded against "the encroachment or aggrandizement of one branch at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). Accordingly, in every case in which the Court has discerned a separation of powers problem, once branch of government has attempted to usurp powers which have been vested by the Constitution in another branch. For example, in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-588 (1952), the Court

held that the President could not exercise legislative authority belonging only to Congress. Likewise, in a series of cases -- which are repeatedly but erroneously relied on by plaintiff -- the Court has held that Congress cannot enact laws, while keeping for itself the power to participate in the execution of those laws. Thus, the Court has concluded that "Congress cannot reserve for itself the power of removal of an officer charged with executive functions" because that allows "Congressional control over the execution of the laws . . ." Bowsher v. Synar, ___ U.S. ___, 106 S.Ct. 3181, 3188 (1986); see also Myers v. United States, 272 U.S. 52 (1925) (removal of Presidential appointment conditioned on Senate approval is unconstitutional). By the same token, Congress cannot attempt to control the execution of the laws by participating in the appointment of executive branch officials, except in the manner specified in Art. II, § 2, cl. 2 of the Constitution. See Buckley v. Valeo, supra. Finally, the Court has held that, once Congress assigns power to the executive branch, it cannot control the exercise of that power through the use of a legislative veto. See INS v. Chadha, 462 U.S. 919 (1983).

It is clear, therefore, that the Supreme Court has been primarily concerned with the excessive concentration of power in the hands of one branch of government and has specifically sought to prevent Congress from maintaining ongoing control over functions delegated to executive officials. However, where, as here, Congress has not attempted to usurp executive powers for

itself, but has merely enacted laws which set standards for the exercise of those powers, the Supreme Court has taken an entirely different, and far less rigid approach, to the separation of powers doctrine. Thus, in Humphrey's Executor v. United States, 295 U.S. 602 (1935), the Court upheld a statute which permitted the President to remove an executive branch official only for "inefficiency, neglect of duty, or malfeasance in office," and in Bowsher v. Synar, the Court noted that its ruling was not intended to cast doubt on the validity of independent agencies whose members are only removable by the President for specified causes. 106 S.Ct. at 3188 n.4. It is clearly established, therefore, that "illimitable power of removal is not possessed by the President," Humphrey's Executor v. United States, *supra*, 295 U.S. at 628-629, and that "the President may not insist that [executive] functions be delegated to an appointee of his removable at will" Buckley v. Valeo, *supra*, 424 U.S. at 141; *see also* Federal Trade Commission v. American National Cellular, Inc., No. 86-5760, slip op. at 6 (9th Cir. February 25, 1987) (finding that Humphrey's Executor is consistent with Chadha and Bowsher).

The leading case which analyzes the separation of powers doctrine in the context of a statute that regulates, but does not usurp executive functions is Nixon v. GSA, *supra*. That case involved President Nixon's challenge to a legislative scheme that intrudes far more into the executive branch than the Independent Counsel provisions of the Ethics in Government Act. The

Presidential Recordings and Materials Preservation Act, 44 U.S.C. § 2111 note (the "Materials Act"), requires the National Archives to take complete "possession and control" of all tape recordings and documents of the Nixon Administration and to develop regulations providing for public access to those materials, except for portions that could be withheld under a legitimate claim of right or privilege. *Id.*

President Nixon challenged this legislative scheme, relying on essentially the same view of the separation of powers doctrine which is advanced by plaintiff here. Thus, President Nixon contended that the three branches of government are "totally distinct and autonomous, and that the separation of powers doctrine bars action by one branch that even indirectly impinges upon another." *Nixon v. GSA*, 408 F. Supp. 321, 341 (D.D.C. 1976) (three-judge court). However, that formulation was rejected by the Supreme Court, which instead endorsed a pragmatic balancing test:

[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-712 . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443. Refraining from considering "future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents,"

the Court found that "nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face." *Id.* at 445. On the other side of the coin, the Court found that "substantial public interests" were furthered by the Materials Act, including preservation of the "[Nixon] materials for legitimate historical and governmental purposes," as well as the need to

restore public confidence in our political processes by preserving the materials as a source for facilitating a full airing of the events leading to appellant's resignation, and Congress' need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation.

Id. at 453. Because Congress' legitimate interests in passing the Materials act easily outweighed any interference with executive branch functions, the Court concluded that there was no violation of the separation of powers doctrine. As we next demonstrate, the same result must be reached in this case.

II. THE INDEPENDENT COUNSEL PROVISIONS OF THE ETHICS IN GOVERNMENT ACT DO NOT VIOLATE THE PRINCIPLE OF SEPARATION OF POWERS.

When the foregoing principles are applied here, it becomes clear that plaintiff's constitutional challenge is totally without merit. To begin with, this is plainly not a case in which Congress has attempted to usurp executive power for itself. Nothing in the Independent Counsel law authorizes Congress to exert any control, either directly or indirectly, over executive branch functions. Under the statute, Congress does not

participate in the appointment or removal of independent counsels, nor does it retain any control over the scope or outcome of investigations or prosecutions. In fact, Congress' role is expressly restricted to routine oversight functions; independent counsels are authorized to report to Congress on their general activities, and to specifically advise the House of Representatives as to information which may suggest grounds for impeachment. 28 U.S.C. § 595. No plausible argument can be constructed that this oversight function alone constitutes legislative encroachment on executive branch activities and, indeed, it is far less intrusive than many other types of Congressional oversight of executive branch functions. Thus, the core factor which has triggered every Supreme Court finding of a separation of powers violation is simply not present here.

Since this case does not involve Congressional usurpation of executive powers, then it must be analyzed within the framework established in Nixon v. GSA, i.e., the Court must evaluate whether the Independent Counsel law disrupts the executive branch and, if so, whether that disruption is justified by legitimate legislative objectives. Under that analysis, the Independent Counsel law must be declared constitutional.

First, as in Nixon v. GSA, implementation of the statute is almost entirely dependent on executive branch officials. Thus, only the Attorney General can apply for appointment of an independent counsel after he (1) determines that his own investigation of a high government official, or an investigation

conducted by another officer of the Department of Justice, may result in personal, financial, or political conflict of interest; (2) determines that there is sufficient credible information to undertake a preliminary investigation; and (3) determines that there are reasonable grounds to conclude that further investigation and prosecution is appropriate. 28 U.S.C. §§ 591, 592. If the Attorney General, after completing a preliminary investigation, finds that "there are no reasonable grounds to believe that further investigation or prosecution is warranted . . . the division of the court shall have no power to appoint an independent counsel." *Id.* at § 592(b)(1). In view of this unambiguous statutory language, the Court of Appeals has held that "Congress specifically intended in the Ethics in Government Act to preclude judicial review . . . of the Attorney General's decisions not to investigate or seek appointment of an independent counsel with respect to officials covered by the Act." Banzhaf v. Smith, 737 F.2d 1167, 1168 (D.C. Cir. 1984) (en banc).

Simply stated, an independent counsel cannot even exist unless and until the Attorney General, an executive branch official, makes no less than three separate determinations which fall entirely within his discretion. If anything, therefore, the Court is confronted with a legislative scheme that actually increases executive power by giving the Attorney General the option to trigger an independent investigation and thus avoid the appearance of a conflict of interest. As explained in the Senate

Report accompanying the legislation

The appointment of a temporary special prosecutor would be of assistance to the Attorney General in a situation where the proper exercise of discretion calls for a decision not to prosecute a high-level government official publicly accused of criminal wrongdoing. The use of an independent temporary special prosecutor free from any conflict of interest would result in public acceptance of a decision not to prosecute that may be entirely justified on the merits; whereas the same decision made by the Attorney General who has a conflict of interest, or the appearance thereof, might breed public distrust of the decision not to prosecute.

S. Rep. No. 95-170, 95th Cong., 2d Sess. 6 (1977) ("Senate Report").

Moreover, even after an independent counsel is appointed, neither Congress nor the judiciary has any continuing role under the statute. However, the independent counsel is required to "comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." 28 U.S.C. § 594(f). And only the Attorney General is authorized to remove an independent counsel from office, although such removal must be based on "good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." *Id.* at § 596(a). As noted, the Supreme Court approved a similar provision in Mumphy's Executor, *supra*, and last year it suggested that there is no constitutional defect in statutes which authorize the President to remove independent agency officials only "for specified causes." Bowsher v. Synar, *supra*,

106 S.Ct. at 3188 n.4.¹

Indeed, the only substantive role that any branch of government (outside the executive branch) has in the entire statutory scheme is the power by the special court to actually name an independent counsel and establish his jurisdiction. Since the court must name an independent counsel whenever the Attorney General requests that it do so, 28 U.S.C. § 593(b), and since the definition of the counsel's mission must be based on information submitted in the Attorney General's application, *id.* at § 592(d)(1), the court's tasks are essentially ministerial and pale in comparison with the important, discretionary responsibilities assigned to the Attorney General. In any event, the court's appointment power is expressly permitted by Article II, § 2, cl. 2 of the Constitution, and is also indistinguishable from the longstanding authority of district courts to appoint interim United States attorneys. *See* 28 U.S.C. § 546. The power to make such appointments has been attacked on constitutional grounds only once in almost forty years, and the challenge was summarily rejected. *See United States v. Solomon*, 216 F. Supp.

¹The Attorney General recently appointed defendant Walsh as a special prosecutor within the executive branch who will be subject to the same removal restrictions set out in the Independent Counsel law. If the Attorney General has agreed to these restrictions solely as a matter of Justice Department policy, as appears to be the case, those restrictions are fully binding on the Attorney General, *see Nader v. Bork*, 366 F. Supp. 104, 108 (D.D.C. 1973), and hence the identical removal limitations in the Independent Counsel law are simply redundant. The recent appointment could not, however, validate prior actions taken by defendant under the authority of the Independent Counsel law.

As in Nixon v. GSA, therefore, the executive branch is far more involved in implementing the statutory scheme than either of the other branches of government. And, to the extent that the independent counsel is intended to function largely autonomously in the actual investigation and prosecution of offenses, there is no material diminution of executive power. Independent counsels can be appointed only to investigate and prosecute major offenses committed by a narrow class of officials. In addition, they can pursue only specific, discrete investigations and, once those investigations have been completed, their offices are terminated.

Any intrusion which is occasioned by such limited investigations "can only be termed de minimis," Ameron, Inc. v. United States Army Corp of Engineers, No. 85-5226, slip op. at 19 (3rd Cir. December 31, 1986), quoting Commodity Futures Trading Comm'n v. Schor, ___ U.S. ___, 106 S.Ct. 3245, 3260 (1986). Indeed, as this case vividly illustrates, the independent counsel investigations are often embraced by the President and the Attorney General as a means of defusing a politically volatile situation. Thus, just as the Supreme Court deemed it noteworthy in Nixon v. GSA that President Ford has signed the Materials Act into law, 443 U.S. at 441, it is likewise significant that President Carter approved the Independent Counsel law and that President Reagan endorsed an independent investigation in this case. Of course, there may come a time when a particular investigation is not so favorably regarded by an incumbent President, but such "hypothetical horrors" are not presently

before the Court. Nixon v. GSA, supra, 408 F. Supp. at 321.

At bottom, the Independent Counsel law intrudes far less into executive branch functions than the statute at issue in Nixon v. GSA. Thus, in contrast to the Materials Act, which imposes sweeping, mandatory duties on executive branch officials, the Independent Counsel law is a narrowly drawn and carefully crafted statute which actually augments executive power by giving the Attorney General and the President an opportunity to avoid the political backlash and public outcry that could attend internal investigations of matters such as this one. On the other hand, the legitimate public interests served by the statute are at least as compelling as those furthered by the Materials Act.

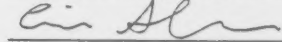
Following the Watergate abuses, including the abrupt termination of special prosecutor Archibald Cox, Congress held extensive hearings and concluded that "[n]o one who has watched 'Watergate' unfold can doubt that the Justice Department has difficulty investigating and prosecuting high officials, or that an independent prosecutor is freer to act according to politically neutral principles of fairness and justice." Senate Report at 3, quoting Watergate Special Prosecution Force Final Report at 137-138. Moreover, Congress wanted investigations of high government officials to conform to the "basic tent of our legal system that a lawyer cannot act in a situation where he has a conflict of interest," and, by the same token, it wanted to alleviate the "harm to the morale and self-esteem of the

employees of the Department" of Justice which "is caused when the senior attorneys in the Department feel compelled to act in the face of a conflict of interest instead of abstaining as our normal principles of ethics require." Senate Report at 7. Finally, Congress was convinced that the "mere existence" of the Independent Counsel law could "act as a substantial deterrent to extreme situations such as Watergate," and could thereby help in restoring public confidence in government. *Id.* That, of course, was also one of the Materials Act's principal justifications, and it was expressly endorsed by the Supreme Court. *See* 433 U.S. at 453.

When the interests served by the Independent Counsel law are brought into sharp focus, it becomes clear that the law is not only compatible with separation of powers principles, but it actually effectuates them. As Justice Brandeis has explained, "[t]he doctrine of separation of powers was adopted by the Convention of 1787 . . . to preclude the exercise of arbitrary power." *Myers v. United States*, *supra*, 272 U.S. at 293 (dissenting opinion). As we have learned from the Watergate years, there is no exercise of power with a greater potential for abuse or arbitrariness than the investigation of criminal activity by executive officials who have a personal interest in the outcome of the investigation. The Independent Counsel law is not only permitted by the Constitution, it is essential to safeguard our constitutional system. We therefore urge the Court

to reject plaintiff's separation of powers argument and dismiss
this case on the merits.

Respectfully submitted,



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Dated: March 6, 1987

STEPS IN THE INDEPENDENT COUNSEL PROCESS

- (1) AG receives information on covered individual.
- (2) AG determines whether information is **specific** and from a **credible** source.
- (3) If specific and credible, AG must conduct a **preliminary investigation**.
- (4) If preliminary investigation, AG must file a **report** with special court no later than 90 days after receipt of information.
 - (a) If no reasonable grounds to believe further investigation or prosecution is warranted, case closed.
 - (b) If reasonable grounds to believe further investigation or prosecution is warranted, AG must request an Independent Counsel.
 - (c) If no determination made during 90-day period, AG must request an Independent Counsel.

SUBCOMMITTEE ANALYSIS OF CASES FILED WITH THE
INDEPENDENT COUNSEL DIVISION OF THE D.C. COURT OF APPEALS
AS OF FEBRUARY 5, 1987

	1979	1980	1981	1982	1983	1984	1985	1986	1987	TOTAL
ANNUAL NUMBER OF CASES FILED	7	1	2	5	2	2	1	7*	3	30
FILED BY AG	7	1	2	2	0	1	1	5	1	20
FILED BY OTHER	0	0	0	3	2	1	0	2	2	10
RECUSAL BY AG	0	0	0	0	0	0	1	1	1	3
IC DECLINED BY AG**	6	0	1	2	0	0	0	1	0	10
IC SOUGHT BY AG**	1	1	1	0	0	1	1	4	1	10
JURIS. DISPUTE AROSE	0	0	0	0	0	0	0	3	0	3
JUDICIARY COMMITTEE FILING WITH COURT	0	0	0	0	0	0	0	2	0	2

AG-Attorney General of United States; IC-independent counsel;
JURIS.-jurisdiction (of independent counsel investigation)

*In one 1986 filing, In re Olson, the AG sought an IC for one person but declined an IC for two other persons. This filing is treated as a single case, in which an IC was sought by the AG.

**Two cases with suggestive but inconclusive data are included in the chart, one described as a case in which an IC was declined and the other in which an IC was sought.

TITLE VI—AMENDMENTS TO TITLE 28, UNITED STATES CODE

INDEPENDENT COUNSEL

SEC. 601. (a) Title 28 of the United States Code is amended by inserting immediately after chapter 37 the following new chapter:

"Chapter 39.—INDEPENDENT COUNSEL

Sec.

- "591. Applicability of provisions of this chapter.
- "592. Application for appointment of an independent counsel.
- "593. Duties of the division of the court.
- "594. Authority and duties of an independent counsel.
- "595. Reporting and congressional oversight.
- "596. Removal of an independent counsel; termination of office.
- "597. Relationship with Department of Justice.
- "598. Termination of effect of chapter.

"§ 591. Applicability of provisions of this chapter

"(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense.

"(b) The persons referred to in subsection (a) of this section are—

"(1) the President and Vice President;

"(2) any individual serving in a position listed in section 5312 of title 5;

"(3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

"(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

"(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

"(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such

individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;

"(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office; and

"(8) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President.

"(c) Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General may conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest."

"§ 592. Application for appointment of an independent counsel

"(a) (1) Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. In determining whether grounds to investigate exist, the Attorney General shall consider—

"(A) the degree of specificity of the information received, and

"(B) the credibility of the source of the information.

"(2) In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

"(b) (1) If the Attorney General, upon completion of the preliminary investigation, finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint an independent counsel.

"(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

"(3) Such memorandum shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

"(c) (1) If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapse from the receipt of the information without a determination by the

Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of an independent counsel.

In determining whether reasonable grounds exist to warrant further investigation or prosecution, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

"(2) If—

"(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional information sufficient to constitute grounds to investigate about the matter to which such memorandum related, and

"(B) the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that reasonable grounds exist to warrant further investigation or prosecution,

then the Attorney General shall, not later than ninety days after receiving such additional information, apply to the division of the court for the appointment of an independent counsel.

"(d) (1) Any application under this chapter shall contain sufficient information to assist the division of the court to select an independent counsel and to define that independent counsel's prosecutorial jurisdiction.

"(2) No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

"(e) The Attorney General may ask an independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

"(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

"§ 593. Duties of the division of the court

"(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

"(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction. An independent counsel's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned or any criminal information is filed.

"(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing independent coun-

sel, and such expansion may be in lieu of the appointment of an additional independent counsel.

"(d) The division of the court may not appoint as an independent counsel any person who holds or recently held any office of profit or trust under the United States.

"(e) If a vacancy in office arises by reason of the resignation or death of an independent counsel, the division of the court may appoint an independent counsel to complete the work of the independent counsel whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

"(f) Upon a showing of good cause by the Attorney General, the division of the court may grant a single extension of the preliminary investigation conducted pursuant to section 592(a) of this title for a period not to exceed sixty days.

"(g) Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, in its discretion, award reimbursement for all or part of the attorney's fees incurred by such subject during such investigation if—

"(1) no indictment is brought against such subject; and

"(2) the attorney's fees would not have been incurred but for the requirements of this chapter.

"§ 594. Authority and duties of an independent counsel

"(a) Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

"(1) conducting proceedings before grand juries and other investigations;

"(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel deems necessary;

"(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

"(4) reviewing all documentary evidence available from any source;

"(5) determining whether to contest the assertion of any testimonial privilege;

"(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate,

participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

"(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

"(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

"(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

"(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

"(b) An independent counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

"(c) For the purposes of carrying out the duties of the office of independent counsel, an independent counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as such independent counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

"(d) An independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

"(e) An independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. An independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

"(f) An independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

"(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an

investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

"§ 595. Reporting and congressional oversight

"(a) An independent counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of such independent counsel. These statements and reports shall contain such information as such independent counsel deems appropriate.

"(b) (1) In addition to any reports made under subsection (a) of this section, and before the termination of an independent counsel's office under section 596(b) of this title, such independent counsel shall submit to the division of the court a report under this subsection.

"(2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.

"(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

"(c) An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

"(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

"(e) A majority of majority party members or a majority of all non-majority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of an independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such appli-

cation was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

"§ 596. Removal of an independent counsel; termination of office

"(a) (1) An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

"(2) If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b) (3) of this title and under the same limitations as apply to the release of a report under that section.

"(3) An independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.

"(b) (1) An office of independent counsel shall terminate when (A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the independent counsel files a report in full compliance with section 595(b) of this title.

"(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the independent counsel shall file the report required by section 595(b) of this title.

"§ 597. Relationship with Department of Justice

"(a) Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel

under section 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

"(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

"§ 598. Termination of effect of chapter

"This chapter shall cease to have effect five years after the date of the enactment of the Ethics in Government Act Amendments of 1982, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such independent counsel require such continuation until that independent counsel determines such matters have been completed."

(b) The tables of chapters for title 28 of the United States Code and for part II of such title 28 are each amended by inserting immediately after the item relating to chapter 37 the following new item:

"39. Independent Counsel."

(c) There are authorized to be appropriated for each fiscal year such sums as may be necessary, to be held by the Department of Justice as a contingent fund for the use of any independent counsel appointed under chapter 39 (relating to independent counsel) or title 28 of the United States Code in the carrying out of functions under such chapter.

ASSIGNMENT OF JUDGES TO DIVISION TO APPOINT INDEPENDENT COUNSELS

SEC. 602. (a) Chapter 3 of title 28 of the United States Code is amended by adding at the end the following:

"§ 49. Assignment of judges to division to appoint independent counsels

"(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing independent counsels.

"(b) Except as provided under subsection (f) of this section, assignment to such division of the court shall not be a bar to other judicial assignments during the term of such division.

"(c) In assigning judges or justices to sit on such division of the court, priority shall be given to senior circuit judges and retired justices.

"(d) The Chief Justice of the United States shall designate and assign three circuit court judges or justices, one of whom shall be a judge of the United States Court of Appeals for the District of Columbia, to such division of the court. Not more than one judge or

justice or senior or retired judge or justice may be named to such division from a particular court.

"(e) Any vacancy in such division of the court shall be filled only for the remainder of the two-year period in which such vacancy occurs and in the same manner as initial assignments to such division were made.

"(f) Except as otherwise provided in chapter 38 of this title, no member of such division of the court who participated in a function conferred on the division under chapter 39, of this title involving an independent counsel shall be eligible to participate in any judicial proceeding concerning a matter which involves such independent counsel while such independent counsel is serving in that office or which involves the exercise of such independent counsel's official duties, regardless of whether such independent counsel is still serving in that office."

(b) The table of sections for chapter 3 of title 28 of the United States Code is amended by adding at the end of the following item:

"49. Assignment of judges to division to appoint independent counsels."

DISQUALIFICATION OF OFFICERS AND EMPLOYEES OF THE DEPARTMENT OF JUSTICE AND ANNUAL REPORT OF ATTORNEY GENERAL

SEC. 603. (a) Chapter 31 of title 28 of the United States Code is amended by adding at the end the following:

"§ 528. Disqualification of officers and employees of the Department of Justice

"The Attorney General shall promulgate rules and regulations which require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof. Such rules and regulations may provide that a willful violation of any provision thereof shall result in removal from office.

"§ 529. Annual report of Attorney General

"Beginning on June 1, 1979, and at the beginning of each regular session of Congress thereafter, the Attorney General shall report to Congress on the activities and operations of the Public Integrity Section or any other unit of the Department of Justice designated to supervise the investigation and prosecution of—

"(1) any violation of Federal criminal law by an individual who holds or who at the time of such violation held a position, whether or not elective, as a Federal Government officer, employee, or special employee, if such violation relates directly or indirectly to such individual's Federal Government position, employment, or compensation;

"(2) any violation of any Federal criminal law relating to lobbying, conflict of interest, campaigns, and election to public office committed by any person, except insofar as such violation relates to a matter involving discrimination or intimidation on grounds of race, color, religion, or national origin;

"(3) any violation of Federal criminal law by any individual who holds or who at the time of such violation held a position, whether or not elective, as a State or local government officer or employee, if such violation relates directly or indirectly to such individual's State or local government position, employment, or compensation; and

"(4) such other matters as the Attorney General may deem appropriate.

Such report shall include the number, type, and disposition of all investigations and prosecutions supervised by such Section or such unit, except that such report shall not disclose information which would interfere with any pending investigation or prosecution or which would improperly infringe upon the privacy rights of any individuals."

(b) The table of sections for chapter 31 of title 28 of the United States Code is amended by adding at the end the following:

"528. Disqualification of officers and employees of the Department of Justice.

"529. Annual report of Attorney General."

EFFECTIVE DATE

SEC. 604. Except as provided in this section, the amendments made by this title shall take effect on the date of the enactment of this Act. The provisions of chapter 39 of title 28 of the United States Code, as added by section 601 of this Act, shall not apply to specific information received by the Attorney General pursuant to section 591 of such title 28, if the Attorney General determines that—

(1) such specific information is directly related to a prosecution pending at the time such specific information is received by the Attorney General;

(2) such specific information is related to a matter which has been presented to a grand jury and is received by the Attorney General within one hundred and eighty days of the date of the enactment of this Act; or

(3) such specific information is related to an investigation that is pending at the time such specific information is received by the Attorney General, and such specific information is received by the Attorney General within ninety days of the date of the enactment of this Act.



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

15 May 1987

Honorable Carl M. Levin
Chairman
Subcommittee on Oversight of
Government Management
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find attached responses to questions posed in your letter of March 30, 1987, concerning nineteen cases under the Independent Counsel statute, thirteen of which were described in precis submitted to you by the Department and six of which were described in my testimony.

Please contact me if I can be of further assistance.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "J.R. Bolton".

John R. Bolton
Assistant Attorney General

Attachments

QUESTIONS TO THE DEPARTMENT OF JUSTICE ON THE CASES
WHICH ARE THE SUBJECT OF THE 13 PRECIS
AND THE SIX DESCRIPTIONS IN MR. BOLTON'S TESTIMONY

Question No. 1:

Q. - How many days elapsed between the date the information was received under 28 U.S.C. §§592(a)(1) and (c)(1) in each case and the date the decision was made not to initiate a preliminary investigation? Please use as the date received the first date your records show that the information was made known to anyone in the Justice Department. Please also provide for each case the first date the information was made known to anyone in the Public Integrity Section or Attorney General's Office. In addition, please provide for each case the date the Attorney General personally determined that the information warranted further investigation or prosecution.

A. - As to each of the nineteen cases, we have listed (1) the number of days that elapsed between the receipt of information by anyone in the Justice Department and its delivery to either the Public Integrity Section or the Office of the Attorney General; (2) the number of days that elapsed between the receipt of the information by the Public Integrity Section and the determination that no preliminary investigation was warranted; and (3) the number of days that elapsed between the receipt of the information by the Public Integrity Section and the final closing of the matter. (Your letter requested the date "the Attorney General personally determined that the information warranted further investigation or prosecution"; however, since none of these matters resulted in a preliminary investigation, no such determination was ever made. We have provided instead the length of the overall inquiry.)

Please note that in some cases we do not have documentation of the exact date of the Department's receipt of the information, but to our knowledge the information was transmitted directly and immediately to the Public Integrity Section. Therefore, instead of listing a particular number of days, we have used the phrase

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"no delay" in answers designated (1) below to so signify. With regard to answers designated (2), the phrase "no delay" indicates that the determination that the allegation itself did not trigger the independent counsel provisions was made immediately upon review of the allegation and any incoming material, which may have required a few days. Our records do not in all cases reflect exactly how many days that process required.

Case 1: (1) 24 days
(2) No delay
(3) None

Case 2: The matter originated with an investigation conducted by a United States Attorney's Office in 1983. In September 1983, during the investigation, Person A became a covered person under the independent counsel provisions of the Ethics in Government Act. The Public Integrity Section was informed of the matter and was kept apprised of the case. In January 1985, the United States Attorney found no prosecutive merit in the information concerning Person A, and the Public Integrity Section concurred in the closing of the case.

In August 1985, new information that related to the same matter emerged in a separate but related investigation conducted by the same United States Attorney. In September 1985, the Public Integrity Section reviewed the investigative file and determined that there was insufficient information of criminal misconduct to warrant the initiation of a preliminary investigation as to Person A. On May 29, 1986, the Public Integrity Section was notified of the United States Attorney's decision to close the case as to Person A. The matter was reviewed by the

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Public Integrity Section, which determined on July 2, 1986, that the information pertaining to Person A did not warrant the initiation of a preliminary investigation.

- Case 3: (1) No delay
(2) No delay
(3) 5½ months
- Case 4: (1) No delay
(2) No delay
(3) 20 days
- Case 5: (1) No delay
(2) No delay
(3) 5 days
- Case 6: (1) No delay
(2) Held in abeyance pending inquiry; 63 days
(3) 63 days
- Case 7: (1) No delay
(2) Approximately 11 days
(3) None
- Case 8: (1) No delay
(2) Approximately 8 days
(3) 4½ months
- Case 9: (1) No delay
(2) 2 days
(3) 6 months
- Case 10: (1) No delay
(2) 60 days
(3) None
- Case 11: (1) Approximately 30 days
(2) 58 days
(3) None
- Case 12: (1) No delay
(2) Approximately 8 days
(3) 4½ months
- Case 13: (1) No delay
(2) No delay
(3) Pending
- Case (a): (1) 1 day
(2), (3) Varied; allegations against all covered individuals initially assessed within 30 days and finally closed within 94 days

- Case (b): (1) 6 days
(2) Immediate with respect to 2 individuals;
study of incoming material required with respect to 3d
individual, which required several days.
(3) 55 days
- Case (c): (1) 2 days
(2) 16 days
(3) None
- Case (d): (1) No delay
(2) No delay
(3) None
- Case (e): (1) No delay
(2) No delay
(3) None
- Case (f): (1) No delay
(2) No delay
(3) 7 months

Question No. 2:

Q. - Were the decisions in each of these cases not to proceed to a preliminary investigation made by the Attorney General personally? Did the Attorney General recuse himself from any of the cases? In any of these cases, did the recommendation of the Public Integrity Section differ from the final decision of the Attorney General? If so, please identify these cases, using the labels given below.

A. - In each case, the Public Integrity Section concluded that no preliminary investigation was warranted.

Question No. 3:

Q. - How many of the nineteen cases did not go to the preliminary investigation stage primarily because the source was not credible? For each of the nineteen cases, describe the source for the information in generic terms such as "federal agency," "government official" or "private citizen," and indicate whether the source was determined by the Department to be credible.

A. - In a number of the cases, the degree of credibility of the source was questionable enough to have affected the determination that no preliminary investigation was warranted. In four cases, the lack of credibility of the source was substantial enough that it was determinative of the issue of whether the statute should be triggered. The sources of the information or allegation for each of the nineteen cases are indicated below:

- Case 1: Private person
- Case 2: Multiple sources; information arose from an ongoing investigation
- Case 3: Private person
- Case 4: Private person
- Case 5: Private person
- Case 6: Federal agency
- Case 7: Federal agency and press reports
- Case 8: Federal agency and press reports
- Case 9: State officials
- Case 10: Federal employee
- Case 11: Federal agency
- Case 12: Federal agency
- Case 13: Private persons
- Case (a): Congress (House Judiciary Committee)

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- Case (b): Federal employee
- Case (c): Press reports
- Case (d): Press reports
- Case (e): Congress, based on press reports
- Case (f): Press reports

Case #1:

Q. - How did the Department determine that the source was unreliable? Was additional evidence (besides the tapes) sought? Was the basis for not proceeding to a preliminary investigation the lack of a credible source, the lack of specific information, or both?

A. - The source was a well-known public figure who has repeatedly engaged in bizarre public behavior and made numerous wild allegations against others. When he failed to produce the tapes he claimed to have, no further effort was made to investigate his allegations. No preliminary investigation was warranted because he was a patently incredible source, and his allegations were vague, wholly lacking in specificity or support.

Case #2:

Q. - What steps were taken to determine whether the information was or could be specific information? Was the information determined to be from a credible source? Was any analysis done as to whether or not any criminal statutes may have applied?

A. - The information concerning Person A emerged in bits and pieces during an extensive investigation of possible contract fraud involving the government agency of which he was the head. After Person A became a covered person, and periodically thereafter during the course of the investigation, the information possibly implicating Person A was reviewed to determine whether sufficient information had been gathered to warrant a preliminary investigation. The information fell into two categories: (1) the possibility that Person A might have directed a contract to a company in which he possibly had a financial interest, and (2) the possible receipt of a gratuity by Person A. There was never any specific allegation of a crime by Person A; these were merely hypothetical possibilities based on the facts known. The inquiry ultimately determined that Person A had no part in the contract award, and had no stake in the company which received the contract. Furthermore, while he had received some meals from employees of the company, the evidence indicated that those individuals were longstanding personal friends, and that the meals had been reciprocated by Person A.

Case #3:

Q. - How was it determined that the source was unreliable? What specific steps were taken during the "inquiry" to determine whether or not the allegations were substantiated?

A. - The sources were two associates of an individual, who reported that the individual told them that he was involved in negotiating and providing collateral for a multi-billion dollar government-backed loan from the United States to a foreign nation. The loan, however, was to be based on fraudulent collateral. The individual allegedly claimed that Person A was representing the United States in negotiating the loan, and that, in return for his assistance, Person B would receive a bribe in the form of a commission of five million dollars.

Specific steps taken during the inquiry to determine whether the individual could be considered credible and whether the allegations could be substantiated included: (1) interviews of the individual and his associates; (2) review of certain telephone toll records voluntarily provided by certain establishments; (3) review of the individual's criminal background; and (4) discussions with government employees who were in a position to have knowledge of any contemplated loans between the United States and the foreign government.

The individual himself denied the allegations, denied the alleged conversations with his associates, and denied any association with Person B. Telephone conversations described by the associates were not reflected in telephone records. Government officials who would have known about any contemplated loan indicated that they had heard of no such loan as described by the

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associates, and stated that a loan as described by the associates would be extremely unlikely. Two other individuals allegedly involved in the deal were interviewed and denied any knowledge of such a loan or any connection between the individual and Person B. Finally, the individual is a convicted felon who has been implicated in various fraudulent business schemes in the past. For all the reasons listed above, it was determined that he was so unreliable that no preliminary investigation was warranted.

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Case #4:

Q. - Was the informant determined to be unreliable? What specific steps were taken during the "inquiry" to determine whether or not the allegations were substantiated? Was there any assessment made as to the presence or absence of the elements of the crime of bribery? Was the state of mind of Person C a factor in determining that the allegation could not be confirmed?

A. - The allegation was second-hand hearsay, and the source was a federal prisoner. The source and two fellow inmates who were the alleged sources of his information were interviewed, as was a fourth individual allegedly involved. The source (Source 1) reported that Source 2 had told him there had been a cash bribe paid to Person C. When Source 2 was interviewed, he reported that Source 3 had told him about the payment, but that it was a large campaign contribution. When Source 3 was interviewed, he reported that he had met Person C at party functions, and that he had made small, legitimate campaign contributions. Finally, the person who was claimed by Sources 1 and 2 to have handled the cash transaction was interviewed, and denied any knowledge of any payment of any kind to Person C. The matter was closed at this point.

Given the lack of any substantiation whatsoever for the operative facts of the allegation, there was no need for an independent assessment of the elements of any crime, and the state of mind of Person C was not a factor.

Case #5:

Q. - What was the basis for the Department's determination that the "information was not specific nor credible enough to trigger the Act"? What specific investigative steps were taken to make this determination?

A. - The Department received information that a large campaign contribution had been delivered to Person C in connection with a presidential campaign. Such a contribution may or may not have been illegal, depending on its source, form, attribution, and timing. The lack of specificity of the allegation was compounded by the lack of credibility of the source, who subsequently admitted that aspects of the original allegation were false and that other unrelated allegations were based on his assumption and surmise. The person claimed by the source to be his source of information was interviewed, and denied any knowledge of the campaign contribution or discussing the matter with the source. Confronted with this denial, the source then claimed that the information had been provided to him by yet a third party, a person the source described as prone to exaggeration. The third party and Person C were both interviewed, and both denied all aspects of the allegation.

Based on an analysis of the information provided and the results of the interviews, it was concluded that the source was not credible and the information was not sufficiently specific to warrant initiating a preliminary investigation, and the inquiry was closed.

Cast #6:

Q. - Was the source for the information determined to be credible? If so, what steps were taken by the Department to make this determination? Was the determination that the allegations in this case "are never prosecuted absent aggravating circumstances" based on a Department of Justice written policy? If so, please provide us with a copy of such policy. What specific steps did the Department take to determine that the "aggravating circumstances" in this case were absent? Was the state of mind of Person D a factor in deciding not to begin a preliminary investigation?

A. - To clarify our earlier description, the actual allegation was that Person D, a government official, was registered as an agent for a foreign government, in apparent violation of 18 U.S.C. Section 219. The information that formed the basis of the allegation was a matter of public record and clearly credible.

The determination that such matters are not prosecuted absent aggravating circumstances was not based on written policy, but is established practice. The determination that no aggravating factors were present was based on all the facts and circumstances known to the Department, including the facts that Person D was apparently unaware of the strictures of Section 219, that he took immediate steps to rectify the situation when it was brought to his attention, and that there was no evidence whatsoever that he used his official position to benefit his foreign principal in any way.

Case #7:

Q. - Was there a lack of specificity because a covered individual was not named or because it could not be determined whether the leak was made by the covered individual as opposed to another possible suspect? What specific steps did the Department take in investigating this matter? Was it determined that the source of the information was credible?

A. - The inquiry included extensive interviews and document examinations by the FBI, which reported that it could not determine the source of the leak, but that two covered individuals were among those who were most likely to have been the source. The Public Integrity Section concluded that there was a lack of specificity, and therefore the independent counsel provisions were not triggered, both because no covered individual was ever directly named by anyone as the source of the leak, and because, after inquiry, it could not be determined that the leak had been committed by either of the covered persons, as opposed to any of the other possible suspects. Credibility in the sense used in the independent counsel provisions was not an issue in this determination.

Case #8:

Q. - Was it confirmed that Person E did in fact fail to disclose the \$10,000 loan? What specific steps were taken by the Department to arrive at that confirmation? What specific steps were taken by the Department to determine that there "was no evidence of any 'aggravating circumstances' and no other evidence of willfulness"? Was Person E interviewed? Was there any conflicting evidence on the state of mind of Person E?

A. - Person E, a government official, received a personal loan in the amount of \$9,800 from another government official. Person E did not disclose the loan on his Ethics in Government Act (EIGA) financial disclosure form. The Ethics in Government Act required a disclosure of liabilities of \$10,000 or greater. The addition of accrued interest to Person E's loan would raise his total repayment obligation to more than \$10,000. The law is unclear whether accrued interest must be included in determining whether the \$10,000 reporting threshold has been met.

The government official making the loan to Person E was required by the Ethics in Government Act to disclose all interest in property valued in excess of \$1,000 on his EIGA form. The government official's EIGA form included the following entry - "Person E - Note Receivable" and valued the receivable in the "\$5,001 - \$15,000" category.

The failure to disclose a financial obligation required to be disclosed on an EIGA form can serve as the basis for a 18 U.S.C. §1001 violation where the failure to disclose is accompanied by "aggravating circumstances" or other evidence suggesting the requisite degree of criminal intent. However, if an error on an EIGA form occurs in circumstances which indicate no intent to deceive, the matter is closed. Here, the existence

of a \$9,800 loan from the other government official to Person E did not, in and of itself, suggest an aggravated or venal situation. There was no evidence that Person E could have used his official position to benefit the other government official, nor was there any other extrinsic evidence suggesting that the loan was an improper "payoff" to Person E which he would have wished to keep secret. Rather, the other government official properly reported the loan on his EIGA form. Finally, an ambiguity in the law made it unclear whether accrued interest must be included in determining when the \$10,000 reporting threshold had been met. All of these factors led the Department to conclude that no further investigation was warranted and the matter should be closed without conducting a preliminary investigation.

In conducting this inquiry the Department interviewed Person E and the other government official. Additionally, the EIGA filings of Person E and the other government official were reviewed by Department attorneys.

Case #9:

Q. - Were the allegations against Person F determined to be specific? Were they determined to have been made by a credible source? What specific steps did the Department take to determine whether or not Person F knew about or participated in the alleged activity? Did the Department make or need to make any determination about Person F's state of mind in assessing whether or not to seek a preliminary investigation? If so, was there conflicting evidence on Person F's state of mind?

A. - This is a case in which the allegations were in the nature of "we think Person F may have committed a crime," rather than "Person F committed a crime." The allegations against Person F were made by state officials, political opponents of Person F, and consisted of their conclusions of possible illegal involvement of Person F based on newspaper accounts of the activities of his associates, interviews of local officials, and the financial disclosure reports of Person F. While in some respects specific, the combination of the questionable credibility of the sources as a result of their admitted bias, the unsubstantiated nature of the allegations, and the general vagueness of most of the allegations led to the conclusion that the matter did not warrant a preliminary investigation absent some substantiation of the allegation. Therefore, an inquiry was conducted by the FBI. Several interviews were conducted, as well as a careful review of pertinent records and documents. The inquiry produced no direct evidence of knowledge of or involvement in the alleged criminal activity by the covered individual, and no basis beyond his business association with the individuals on which such knowledge or involvement could be inferred. Therefore, Person F's state of

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mind was not a factor in determining that no preliminary investigation was warranted.

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Case #10:

Q. - Was the information received determined to be specific? Was the information determined to be from a credible source? What specific steps did the Department take to determine whether or not there was evidence of criminal misconduct?

A. - The information was neither specific nor from a credible source. The allegations were not supported by any factual basis, and for the most part did not allege any violation of criminal law. Although there was an allegation that Person F was demanding sexual favors from his staff, which could be a criminal violation if he were demanding such favors in return for his official acts, those allegations were not supported by any facts, and were entirely hearsay. No investigation was done beyond review of the FBI reports of the complaints.

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Case #11:

Q. - Was the information received determined to be specific? Was the information determined to be from a credible source? What specific steps did the Department take to determine whether or not there had been a violation of federal law? Did the Department make or need to make any determination about the state of mind of Person G? If so, was there conflicting evidence on Person G's state of mind? Was there conflicting evidence on whether or not a violation of a federal criminal law had occurred? What conflict of interest or lobbying laws were reviewed?

A. - The information received in this case was specific and the source was credible, as far as it went. However, the criminal statutes involved are not violated merely by the facts as alleged, which were that a former official had signed a brief involving an issue that had been under his general responsibility as a public official. Knowledge of the operative facts by the subject is also required, and there was no allegation of knowledge. An inquiry was conducted to determine if the facts demonstrated, or could reasonably support an inference of, the required knowledge.

Sections 207(a) and 207(b)(i) of Title 18 were the conflict of interest provisions potentially applicable. Both require knowing conduct as an element; therefore, it was necessary to reach a determination about the evidence concerning Person G's state of mind. There was no conflict in the evidence concerning state of mind. After inquiry and analysis, it was concluded that Person G had not violated section 207(a) because the statutory requirement that the representation by the former official involve the same particular matter that had been under his supervision as a public official was not met. There was also no violation of section 207(b)(i), both because of a lack of any

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evidence of actual knowledge on the part of Person G that the matter had been pending under his supervision and because of a serious legal question as to whether the matter was actually pending under his official responsibility when he had been in government office.

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Case #12:

Q. - Was the information received determined to be specific? Was the information determined to be from a credible source? What specific steps were taken to determine the evidence of criminality? From the precis, it is clear that the facts alleged could have been criminal. What elements of the possible criminal violation were missing in this case? Was there conflicting evidence on any of these elements?

A. - A source alleged that he had been told by a company's officer, Officer 1, that Officer 1 had heard that Person H had been asked by another company officer, Officer 2, to intercede in a Justice Department investigation of that company. The credibility of the source was not an issue. As to specificity, the information provided is "specific," but it did not on its face allege any conduct by Person H that was or could be criminal in nature.

The FBI interviewed Officer 1 and Officer 2, both of whom categorically denied the allegation. Person H was not interviewed, but had previously disclaimed any discussions regarding the investigation with anyone at the company or in the government. Certain of the particulars of information provided by Officer 1 to the source were determined to be untrue. The handling of the investigation of the company was determined to be the product of recommendations of the prosecutors involved. No evidence was developed that Person H undertook any act with respect to the investigation.

Since there was neither a specific allegation of the commission of a crime by Person H, nor evidence suggesting the commission of a crime by Person H, no preliminary investigation was initiated.

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Case #13:

Q. - Has the Department received information that is specific and from a credible source?

A. - This case involves allegations not against a covered person, but against that person's staff. The allegations are relatively specific, but the source is of unknown credibility.

Investigation is underway to determine if the allegations can be substantiated, but to date there is no evidence, and no facts on which any inference could reasonably be based, suggesting the covered person's involvement. The alleged involvement of the staff, of course, warrants close monitoring of the investigation to ensure that it is properly handled under the independent counsel provisions should evidence of the covered person's involvement be developed.

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Case (a):

Q. - How many individuals were the subject of the Department's initial inquiry relative to the House Judiciary Committee Report, who were determined not to warrant a preliminary investigation? For each individual, what specific steps were taken to determine that "there were no facts or circumstances suggestive of criminal intent"? Was each individual interviewed? Were other persons interviewed? For each individual, was there any conflicting evidence on the person's state of mind?

A. - The Department's review of the allegations contained in the House Judiciary Committee Report was intensive and involved many individuals. The Special Division of the Court responsible for appointing independent counsels has ordered the unsealing of the memorandum of the Public Integrity Section concerning its review of the Report and its preliminary investigation. This memorandum answers, in detail, each of the questions you ask, and is attached for your information in lieu of a lengthy response here.

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Case (b):

Q. - Were the allegations determined to be specific? Were the allegations determined to be from a credible source? What specific steps were taken to determine that the "allegations were not supported by evidence that, if true, would constitute a federal crime"? If evidence had been found to support the allegations, would the allegations have constituted a federal crime? What federal crimes did the Department specifically analyze?

A. - The allegations as a whole involved a number of individuals, only three of whom were covered persons. This discussion addresses only those allegations concerning the three covered individuals. With respect to those three individuals, it was determined that the allegations lacked sufficient specificity and credibility to warrant a preliminary investigation. Careful and thorough review of the allegations and documents submitted by the source of the allegations found that the allegations against covered persons were based on speculation and conjecture; indeed, the source himself characterized one of his contentions as a "surmise."

Furthermore, the bulk of the allegations against the three covered individuals, even if true, would not have constituted federal crimes. Those criminal statutes that were considered in connection with the allegations, however, included: conspiracy; obstruction of justice and of agency proceedings; subornation of perjury; falsification, concealment, and coverup of material facts; and submission of false statements.

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Case (c):

Q. - Was the information received by the Department determined to be specific? Was the information determined to be from a credible source? What specific steps were taken to determine who was "responsible for the preparation of the controversial Contra training manual (prepared under CIA auspices)"? What was the Department's basis for concluding that the Director of the CIA was not responsible for the manual? What specific steps were taken to determine that "the facts known to [the Department] did not suggest that preparation of the manual violated any federal criminal law"?

A. - Case (c) was handled as an independent counsel matter as a result of a request by Congressman Thomas Downey that the Department of Justice conduct a preliminary investigation and, if appropriate, seek appointment of an independent counsel to look into the circumstances surrounding the publication of the CIA manual. Our reply to the Congressman is attached for your information, and should answer each of your questions. In brief, no specific or credible information was received by the Department of Justice that either the Director or the Deputy Director of the CIA, or any other covered person, was directly involved in any way in the preparation or publication of the manual. Lacking such specific information, there was no necessity to analyze the possible application of any particular criminal statute for the purposes of the independent counsel statute.

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Cases (d) and (e):

Q. - Were the allegations [in Case (d)] determined to be specific? Were the allegations determined to be from a credible source? What specific steps did the Department take to determine that CIA participation in "placing mines in a Nicaraguan harbor," if true, would constitute "authorized conduct of executive branch personnel"?

Were the allegations [in Case (e)] determined to be specific? Were the allegations determined to be from a credible source? What specific steps did the Department take to determine that "aid to the Contras," if true, would constitute "authorized conduct of executive branch personnel"?

A. - These allegations were the subject of Dellums v. Smith, and both the facts of the Department's handling of the allegations and the legal positions of the Department are explained in some detail in the court filings in that case, copies of which are being provided to you at your request. They also were the subject of a request by majority of the majority party members of the House Judiciary Committee for the appointment of an independent counsel, pursuant to 28 U.S.C. §595(e) of the Ethics in Government Act. The Department's statutory response to Chairman Peter Rodino is attached for your information.

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Case (f):

Q. - Were the allegations determined to be specific? Were the allegations determined to be from a credible source? What specific steps were taken during the "inquiry"?

A. - The allegations in this matter did not amount to an allegation of a federal crime by a covered official (The closest thing to an "allegation" was the remark that initiated the entire inquiry, which was a statement by David Stockman that the briefing materials had been "filched" by a "mole" in the President Carter campaign team, without stating how or by whom.) Nevertheless, at President Reagan's request, an extensive inquiry was conducted into the circumstances surrounding the obtaining of briefing materials by his campaign staff. That inquiry and its results are described in a public report issued by the Department, a copy of which is attached for your information.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

21 May 1987

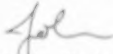
Honorable Carl M. Levin
Chairman
Subcommittee on Oversight of
Government Management
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Attached to this letter are responses to the second set of questions posed in your letter of March 30, 1987, concerning the Independent Counsel statute. Please note that we shortly expect to receive information that will enable us to respond fully to Question 6.

We will also be responding to the remaining issues raised in your March 30, 1987 letter in a subsequent letter. Please contact me if I can be of further assistance.

Sincerely yours,



John R. Bolton
Assistant Attorney General

Attachments

POSTHEARING QUESTIONS
TO THE DEPARTMENT OF JUSTICE REGARDING
THE INDEPENDENT COUNSEL STATUTE

Question No. 1:

Q. - What is Attorney General Meese's personal opinion on the constitutionality of the independent counsel statute, as currently drafted?

A - As I testified before this subcommittee on March 19, it has been the consistent view of this Department over the past six years, and thus of the Attorneys General in office during that time, that the independent counsel statute raises a number of serious constitutional questions, particularly in its provisions for appointment, control and removal of the independent counsel. To the extent not dealt with in my Senate testimony, the Department's views on this matter were set out in my testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on April 23, 1987, and in the government's brief in In re Olson,¹ copies of which are attached hereto for your convenient reference. Any constitutional issues pertaining to the independent counsel statute that are not addressed in the attached documents are still under study in the Department.

¹ Div. No. 86-1 (D.C. Cir. Apr. 2, 1987). At issue in this case was a request by independent counsel Alexia Morrison for a court order expanding her prosecutorial jurisdiction under 28 U.S.C. §594(e). In deciding that it must deny Ms. Morrison's request, the court relied on the structure and specific provisions of the statute. The court agreed with the Department's argument that the unreviewable determination by the Attorney General that no reasonable grounds existed to warrant further investigation of two former Department of Justice officials under 28 U.S.C. 592(b)(1) precluded the independent counsel from later obtaining such jurisdiction from the court under 28 U.S.C. 594(e), particularly after the Attorney General had denied the independent counsel's request for expanded jurisdiction under the latter provision as well. In re Olson, slip op. at 22-25.

Question No. 2:

Q. - How many independent counsels have been formally asked by the Department of Justice to accept a parallel appointment under the independent counsel regulations issued by the Department on March 5, 1987? How many of these persons have accepted that offer and how many have declined? Pursuant to the request of Senator Mitchell at the hearing, please provide the Subcommittee with all written correspondence or memos between the Department of Justice and all independent counsels in which a parallel appointment is discussed.

A. - The Department has offered a parallel appointment to all six current independent counsels. To date, two have accepted, two have declined and two have not responded. Independent Counsels Walsh and McKay were offered and accepted their appointments orally. Independent Counsel Seymour orally declined to accept a parallel appointment, and one of the two independent counsels whose court appointments remain under seal also declined a parallel appointment. We have provided copies of all correspondence responsive to your request, except of course for correspondence with the independent counsels whose appointments remain under seal.

U.S. DEPARTMENT OF JUSTICE

Office of the Independent Counsel

5 1987

The Honorable Lawrence E. Walsh
Independent Counsel
United States Courthouse
Third Street and Constitution
Avenue, N.W.
Room 4434
Washington, D.C. 20001

Dear Judge Walsh:

The Attorney General asked me to send to you for your consideration and review the enclosed regulations establishing an Office of Independent Counsel: Iran/Contra. As you know, these regulations have been discussed with your staff and extensive changes have been made in response to their suggestions.

If the regulations are acceptable to you, the Attorney General is prepared to appoint you to the position of Independent Counsel. If an appointment is made, you should sign and return the standard "Affidavits of Appointment" form which we have enclosed.

It would be highly advantageous to our ability to argue to dismiss the North lawsuit in our brief to be filed today, if the appointment can be made immediately. We appreciate the hard work of your staff in assisting in the crafting of these complex regulations.

Sincerely,

Richard K. Willard
Richard K. Willard
Assistant Attorney General

Attachments

STANDARD FORM 51
REVISED SEPTEMBER 1970
U.S. CIVIL SERVICE COMMISSION
FORM 51-107

GSA APPROVAL NO. 50-10118

APPOINTMENT AFFIDAVITS

Independent Counsel March 5, 1987
(Position to which appointed) (Date of appointment)

Office of the Independent Counsel: Iran/Contra Washington, D.C.
(Department or agency) (Bureau or division) (Place of employment)

I, Lawrence E. Walsh, do solemnly swear (or affirm) that—

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

(Signature of appointee)

Subscribed and sworn (or affirmed) before me this _____ day of _____ A.D. 19____,

at _____ (City) _____ (State)

[SEAL]

(Signature of officer)

Commission expires _____ (Title)
(If by a Notary Public, the date of expiration of his Commission should be shown)

NOTE—The oath of office must be administered by a person specified in 5 U.S.C. 5605. The words "So help me God" in the oath and the word "swear" wherever it appears above should be stricken out when the appointee elects to affirm rather than swear in the affidavit; only these words may be stricken and only when the appointee elects to affirm the affidavit.

U.S. GPO 1979-0-281-167/4238

FINAL DRAFT
11:45 a.m. 3/5/87

UNITED STATES DEPARTMENT OF JUSTICE

28 CFR Chapter VI -- Offices of Independent Counsel

Part 600 -- General Powers of Independent Counsel

Part 601 -- Jurisdiction of the Independent Counsel: Iran/Contra

AGENCY: United States Department of Justice

ACTION: Final Rule.

SUMMARY: This rule establishes an Office of Independent Counsel: Iran/Contra, to be headed by an Independent Counsel. This Office is to be established pursuant to the Attorney General's statutory authority, found in 28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution. This authority is being exercised because of the pending lawsuit captioned North v. Walsh and Meese, D.D.C. No. 87-0457, which challenges the constitutionality of the appointment and activities of the Independent Counsel named pursuant to the Ethics in Government Act (28 U.S.C. 591 et seq.). The President has made clear that he supports a full investigation into the events that the Independent Counsel has been charged with investigating under that Act. In addition, I note that I have already determined that this matter is appropriate for further investigation. In light of the President's views, I have found it advisable to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the North litigation. Thus, this rule is not meant to question

the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities. To the contrary, this rule is intended to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner.

EFFECTIVE DATE: March 5, 1987

FOR FURTHER INFORMATION CONTACT:

Thomas Barba, Counselor to the Assistant Attorney General, Civil Division, Room 3607, U.S. Department of Justice, 10th Street and Pennsylvania Avenue, N.W., Washington D.C. 20530. Telephone: (202)633-5713.

LIST OF SUBJECTS IN 28 CFR CHAPTER VI, PARTS 600, 601:

Crime, Ethical conduct, Foreign Relations, Government employees, Military arms sales, Military personnel, National Defense.

For the reasons given in the preamble, title 28, Code of Federal Regulations, is amended as follows.

1. A new Chapter VI, entitled "Offices of Independent Counsel," is added immediately after Chapter V.

2. A new Part 600 is added as the first Part of Chapter VI, to read as follows:

Part 600 -- General Powers of Independent Counsel

Sec. 600.1.1 General Functions: Authority and duties of an Independent Counsel

Sec. 600.1.2 Reporting and congressional oversight

Sec. 600.1.3 Removal of an Independent Counsel; termination of office

Sec. 600.1.4 Relationship with components of the Department of Justice

Sec. 600.1.5 Savings provision; severability

Authority: 28 U.S.C. 509, 510, and 515; 5 U.S.C 301;

Article II of the United States Constitution

Part 600 -- General Powers of Independent Counsel

Sec. 600.1.1 General Functions: Authority and duties of an Independent Counsel

(a) An Office of Independent Counsel shall be under the direction of an Independent Counsel appointed by the Attorney General. An Independent Counsel shall have, with respect to all matters in his prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18 of the United States Code. Such investigative and prosecutorial functions and powers shall include--

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such Independent Counsel deems necessary;

(3) appealing any decision of a court in any case or proceeding in which such Independent Counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18 of the United States Code, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) An Independent Counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (b) of section 594 of title 28 of the United States Code.

(c) For the purposes of carrying out the duties of the Office of Independent Counsel, an Independent Counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (c) of section 594 of title 28 of the United States Code.

(d) An Independent Counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within the Independent Counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform the Independent Counsel's duties.

(e) An Independent Counsel may ask the Attorney General to refer matters related to the Independent Counsel's prosecutorial jurisdiction. An Independent Counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within the Independent Counsel's prosecutorial jurisdiction as established by this chapter. If such a referral is accepted, an Independent Counsel shall notify the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time.

(f) An Independent Counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) An Independent Counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

Sec. 600.1.2 Reporting and congressional oversight

(a) An Independent Counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of the Independent Counsel. These statements and reports shall contain such information as the Independent Counsel deems appropriate.

(b) (1) In addition to any reports made under subsection (a) of this section, and before the termination of the Independent Counsel's office under this chapter, such Independent Counsel shall submit to the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time, a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the Independent Counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of the Independent Counsel which was not prosecuted.

(3) Unless prohibited by applicable law, an Independent Counsel may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as he deems appropriate.

(c) An Independent Counsel shall advise the House of Representatives of any substantial and credible information which such Independent Counsel receives that may constitute grounds for an impeachment. Nothing in this chapter shall prevent the

Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) Nothing in this chapter shall prevent the appropriate committees of the Congress from exercising oversight jurisdiction with respect to the official conduct of any Independent Counsel appointed under this chapter, and such Independent Counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

Sec. 600.1.3 Removal of an Independent Counsel; termination of office

(a) (1) An Independent Counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the Independent Counsel's duties.

(2) If an Independent Counsel is removed from office, the Attorney General shall promptly submit to the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time, and to the Committees on the Judiciary of the Senate and the House of Representatives, a report specifying the facts found and the ultimate grounds for such removal. The Attorney General will not object to the making available of the report to the public by the Committees or the division of the Court.

(3) To the extent otherwise permitted by law, an Independent Counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of title 28 of the United States Code, if such court exists at that time, or any court of competent jurisdiction and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

(b) An office of Independent Counsel shall terminate when (A) the Independent Counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of the Independent Counsel or accepted by such Independent Counsel under section 600.1.1(e) of this chapter, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the Independent Counsel files a report in full compliance with section 600.1.2(b) of this chapter.

Sec. 600.1.4 Relationship with components of the Department of Justice

(a) Whenever a matter is in the prosecutorial jurisdiction of an Independent Counsel or has been accepted by an Independent Counsel under section 600.1.1(e) of this chapter, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 600.1.1(d) of this chapter, and

except insofar as such Independent Counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an Independent Counsel participates in an official capacity or any appeal of such a case or proceeding.

Sec. 600.1.5 Savings provision; severability

(a) Nothing in this chapter is intended to modify or impair any of the provisions of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of title 28 of the United States Code).

(b) If any provision of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of title 28 of the United States Code) or any provision of this chapter is held invalid for any reason, such invalidity shall not affect any other provision of this chapter, it being intended that each provision of this chapter shall be severable from the Act and from each other provision.

3. A new Part 601 is added immediately after Part 600, to read as follows:

Part 601 -- Jurisdiction of an Independent Counsel:

Iran/Contra

Sec. 601.1.1 Jurisdiction of an Independent Counsel:

Iran/Contra

(a) The Independent Counsel: Iran/Contra has jurisdiction to investigate to the maximum extent authorized by Part 600 of this chapter whether any person or group of persons currently described in 28 U.S.C. § 591, including Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals or organizations acting in concert with Lt. Col. North, or with other United States Government officials, has committed a violation of any federal criminal law, as referred to in 28 U.S.C. § 591, relating in any way to

(1) the direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, material, or funds to the Government of Iran, officials of that government, or persons, organizations or entities connected with or purporting to represent that government, or persons located in Iran;

(2) the direct or indirect sale, shipment, or transfer of military arms, material or funds to any government, entity, or person acting, or purporting to act as an intermediary in any transaction above referred to in section (1);

(3) the financing or funding of any direct or indirect sale, shipment or transfer referred to in section (1) or (2);

(4) the diversion of the proceeds from any transaction described in section (1) or (2) to or for any person, organization, foreign government, or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) the provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

(b) The Independent Counsel: Iran/Contra shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Oliver L. North, and any person or entity heretofore referred to, developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions who are reasonably believed to have committed a violation of any federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense.

(c) The Independent Counsel: Iran/Contra shall have prosecutorial jurisdiction to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of 28 U.S.C. § 1826, or any obstruction of the due administration of justice, or any material false testimony or statement in

violation of the federal criminal laws, in connection with the investigation authorized by part 600 of this chapter.

Edwin Meese III
Attorney General

Date: March 5, 1987

Billing Code: 4410-01

U. S. Department of Justice

Office of the Assistant Attorney General

March 5, 1967

The Honorable Lawrence E. Walsh
Independent Counsel
United States Courthouse
Third Street and Constitution
Avenue, N.W.
Room 4434
Washington, D.C. 20001

Dear Judge Walsh:

The Attorney General has approved the regulations in the form that we have agreed upon. Attached is an executed copy for your files. I have also attached the standard "Appointment Affidavits" form for your signature.

Sincerely,

Richard K. Willard
Richard K. Willard
Assistant Attorney General

Attachments

STANDARD FORM 61
REVISED SEPTEMBER 1970
U.S. CIVIL SERVICE COMMISSION
FPMR (41 CFR) 241
51-107

DMS APPROVAL NO. 50-R0118

APPOINTMENT AFFIDAVITS

Independent Counsel

March 5, 1987

(Position to which appointed)

(Date of appointment)

Office of the Independent Counsel: Iran/Contra

Washington, D.C.

(Department or agency)

(Bureau or division)

(Place of employment)

I, Lawrence E. Walsh, do solemnly swear (or affirm) that—

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

Lawrence E. Walsh
(Signature of appointee)

Subscribed and sworn (or affirmed) before me this 5th day of March, A.D. 1987,

at Washington (City) D.C. (State)

(Seal)

Gregory J. Frost
(Signature of officer)

Commission expires August 14, 1990 (If by a Notary Public, the date of expiration of his Commission should be shown)
Notary Public (Title)

NOTE—The oath of office must be administered by a person specified in 5 U.S.C. 5505. The words "So help me God" in the oath and the word "swear" wherever it appears above should be stricken out when the appointee elects to affirm rather than swear to the affidavit; only those words may be stricken and only when the appointee elects to affirm the affidavit.

U.S. GPO: 1975-6-501-1877-2238



U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

MAY 5 1987

Mr. Whitney North Seymour, Jr.
Brown & Seymour
26th Floor
100 Park Avenue
New York, New York 10017

Dear Mr. Seymour:

I write to confirm our conversation of this date during which I conveyed to you on behalf of the Deputy Attorney General our offer to appoint you as Independent Counsel in the matter of Michael Deaver, an appointment that would derive its authority from the Executive Branch of the Government. This offer was intended, of course, to enable you to overcome objections raised by Mr. Deaver to your statutory authority based on constitutional grounds. We have reached such an agreement with Judge Walsh in the North matter and with James McKay in the Nofziger matter, and it is the intention of the Department of Justice to extend a similar option to you.

For the record, you declined this offer, indicating that it would neither be necessary nor useful at this advanced stage of your work. I would respectfully request that you reconsider your position in the interest of insuring the constitutionality of your authority.

Specifically, we believe that this appointment--even if made at this time--would obviate many of the constitutional issues that have been raised. The principal argument on constitutionality involves the power to prosecute, not the power to appear before a grand jury. So long as a valid appointment is made prior to indictment, then we believe a good argument can be made that any constitutional infirmity has been cured. Moreover, this parallel appointment would also cure any constitutional defect in the court's decision to confer upon you broader jurisdiction than that requested by the Deputy Attorney General.

Sincerely,

Stephen S. Trott
Associate Attorney General



U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

13 -

The Honorable Laurence E. Walsh
Independent Counsel
555 13th Street, N.W.
Suite 781
Washington, D.C. 20004

Dear Judge Walsh:

You have asked that we clarify the authority given an Independent Counsel appointed by the Attorney General under 28 C.F.R. 600.1(c) to "appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary." This provision in the regulations was intended to accomplish a delegation of the Attorney General's general authority, as head of the Department of Justice, to employ personnel, see 5 U.S.C. 3101, and of his particular authority to designate attorneys to conduct legal proceedings, including grand jury proceedings. See 28 U.S.C. 515(a). Attorneys appointed by an Independent Counsel pursuant to the delegation in 28 C.F.R. 600.1(c), and directed by the Independent Counsel to conduct particular legal proceedings, would be regarded as officers of the Department of Justice. See 28 U.S.C. 516 and Fed. R. Crim. Proc. 6(d), 54(c).

In order to effectuate the appointment of your staff, you should have each employee complete the standard "Affidavits of Appointment" form, (copy attached), and be sworn-in in the presence of a person designated in 5 U.S.C. §2003. If you will send a copy of the appointment affidavits to our personnel staff, together with dates of birth and social security numbers of designated staff members, they will execute "standard forms" 50 and 52 to memorialize the appointments. The Department's personnel office will retain the forms on file should it ever become necessary to pay your employees under the parallel

appointments. The appointment affidavits should be sent to John C. Vail, Assistant Director, Personnel Staff, Justice Management Division, Room 4259, Department of Justice, Washington, D.C. 20530. Mr. Vail will return copies of the forms 50 and 52 when they are completed.

Sincerely,



STEPHEN S. TROTT
Associate Attorney General

Attachments

STANDARD FORM 61
REVISED SEPTEMBER 1970
U.S. CIVIL SERVICE COMMISSION
FPMR CHAPTER 25
25.101

GMS APPROVAL NO. 15-00118

APPOINTMENT AFFIDAVITS

(Position to which appointed)

(Date of appointment)

(Department or agency)

(Division or division)

(Place of employment)

I, _____, do solemnly swear (or affirm) that—

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

(Signature of appointee)

Subscribed and sworn (or affirmed) before me this _____ day of _____ A.D. 19____,

at _____

(City)

(State)

[Notary]

(Signature of officer)

Commission expires _____

(If by a Notary Public, the date of expiration of his Commission should be shown)

(Title)

NOTE.—The oath of office must be administered by a person specified in 5 U.S.C. 2005. The words "So help me God" in the oath and the word "swear" wherever it appears shall be stricken out when the appointee elects to affirm rather than swear to the affidavit; only these words may be stricken and only when the appointee elects to affirm the affidavit.

4 U.S.G.P. 1875-6 (25-187142B)

REQUEST FOR PERSONNEL ACTION

2-70 (Rev. 1-10-64) (Prescribed Form)
 Use Check Box

Part I - Requesting Office - Also complete Part II, Items 1 and 20, 34 as necessary.
 A. For Agency Use

C. Personnel Action Required

D. Proposed Effective Date

E. For Administrative Information Use - (Name and Classification Number)

F. Requesting Office Signature, Title, and Date

G. Personnel Action Required

H. Proposed Effective Date

I. Approved By, Signature, Title, and Date

Remarks By Requesting Office (Please Supply Item 31. Personnel Required is employee reassignment and if with a new or additional position or position change for the assignment, attach date sheet on its own separate sheet and attach to SF 50.)

Part II - For Preparation Of SF 50

1. Name (Last, First, Middle)

2. SSN

3. Place of Birth (City, State, Country)

4. Position

5. Grade

6. Pay Plan

7. Pay Rate

8. Pay Band

9. Pay Step

10. Pay Band

11. Pay Step

12. Pay Band

13. Pay Step

14. Pay Band

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78. Pay Band

PRINTED ON REVERSE SIDE

52 (11)

Florida Edition (Revised April 1971)
 Form 1540-01-100-0014

U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

MAR 13 1987

James C. McKay
Independent Counsel
1201 Pennsylvania Avenue, N.W.
Washington, D.C.

Dear Mr. McKay:

You have asked that we clarify the authority given an Independent Counsel appointed by the Attorney General under 28 C.F.R. 600.1(c) to "appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary." This provision in the regulations was intended to accomplish a delegation of the Attorney General's general authority, as head of the Department of Justice, to employ personnel, see 5 U.S.C. 3101, and of his particular authority to designate attorneys to conduct legal proceedings, including grand jury proceedings. See 28 U.S.C. 515(a). Attorneys appointed by an Independent Counsel pursuant to the delegation in 28 C.F.R. 600.1(c), and directed by the Independent Counsel to conduct particular legal proceedings, would be regarded as officers of the Department of Justice. See 28 U.S.C. 516 and Fed. R. Crim. Proc. 6(d), 54(c).

In order to effectuate the appointment of your staff, you should have each employee complete the standard "Affidavits of Appointment" form, (copy attached), and be sworn-in in the presence of a person designated in 5 U.S.C. §2903. If you will send a copy of the appointment affidavits to our personnel staff, together with dates of birth and social security numbers of designated staff members, they will execute "standard forms" 50 and 52 to memorialize the appointments. The Department's personnel office will retain the forms on file should it ever become necessary to pay your employees under the parallel

appointments. The appointment affidavits should be sent to John C. Vail, Assistant Director, Personnel Staff, Justice Management Division, Room 6259, Department of Justice, Washington, D.C. 20530. Mr. Vail will return copies of the forms 50 and 52 when they are completed.

Sincerely,


STEPHEN S. TROTT
Associate Attorney General

Attachments

STANDARD FORM 63
REVISED SEPTEMBER 1970
U.S. CIVIL SERVICE COMMISSION
FPM CHAPTER 295
61-107

OMB APPROVAL NO. 50-10118

APPOINTMENT AFFIDAVITS

(Position to which appointed)

(Date of appointment)

(Department or agency)

(Bureau or division)

(Place of employment)

I, _____, do solemnly swear (or affirm) that—

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

(Signature of appointee)

Subscribed and sworn (or affirmed) before me this _____ day of _____ A.D. 19____,

at _____

(City)

(State)

[seal]

(Signature of officer)

Commission expires _____

(If by a Notary Public, the date of expiration of his Commission should be shown)

(Title)

NOTE.—The oath of office must be administered by a person specified in 5 U.S.C. 2204. The words "So help me God" in the oath and the word "swear" wherever it appears above should be stricken out when the appointee elects to affirm rather than swear to the affidavits; only these words may be stricken and only when the appointee elects to affirm the affidavits.

U.S. GPO: 1979-0-281-187/4238

REQUEST FOR PERSONNEL ACTION

Form 100-1 (Rev. 1-64)

Use Only in 1964

Part I - Requesting Office - Also complete Part II, Items 1 and 20 as necessary.

A. For Action Use

B. For Approval Information Only - Name and Telephone Number

C. Personnel Action Requested

D. Proposed Effective Date

E. Requested By (Signature, Title and Date)

F. Personnel Action Requested

G. Proposed Effective Date

H. Requested By (Signature, Title and Date)

I. Remarks By Requesting Office (Note Supervisors. If action requested is employee resignation and if you know of additional or continuing reasons for the resignation, please state them in a separate letter and attach to SF 52.)

Part II - For Preparation Of SF 50

1. Name (Last, First, Middle)

2. SSN

3. Position - 5. SSN - 4. Date of Birth

5. Veterans Preference

1 - None

3 - 10 Pct. Credit

5 - 10 Pct. Credit

6. Service Grade (Leave)

7. Tenure

8. Residency

9. FEGLI

1 - None

3 - 10 Pct. Credit

5 - 10 Pct. Credit

10. FLSA

11. Sex

12. Citizenship

13. Long Term Sick

14. Effective Date

15. Annuitant Indicator

1. Range Act. CS

2. RETN

16. Wa.

17. Seasoning

18. (Reserved For Other Use)

19-A. NOAC

19-B. Nature of Action

19-A. NOAC

19-B. Nature of Action

19-C. Act

19-D. Authority

19-C. Act

19-D. Authority

19-E. Act

19-F. Authority

19-E. Act

19-F. Authority

20. FROM: Position Title and Number

21. TO: Position Title and Number

21. Name and Location of Employing Office

22. Name and Location of Employing Office

23. Pay Plan & Employment Code

24. Grade in Job

25. Step in Job

26. Salary

27. Pay Plan & Employment Code

28. Grade in Job

29. Step in Job

30. Salary

31. Duty Station

32. Pay Plan & Employment Code

33. Grade in Job

34. Step in Job

35. Salary

36. Remarks

37. Personnel Document

38. Apprehension Code (Change)

Question No. 3:

Q. - Also pursuant to a request of Senator Mitchell at the hearing, please confirm that neither the Attorney General nor any other employee of the Department of Justice has had discussions, in person, in meetings or in telephone conversations, with Michael Deaver or Lt. Col. North, their attorneys or other representatives, regarding their constitutional challenges to the statute. If such discussions have taken place, describe each discussion in detail, including the date it took place, the participants, and the topics discussed.

A. - As I testified at the hearing, the Department of Justice did not encourage or assist Messrs. Deaver, North or their attorneys in the preparation of any of their briefs on the merits, nor in terms of the substantive positions they took. Of course, in light of the fact that the Attorney General is a named defendant in North v. Walsh and Meese, Department employees had numerous conversations with the attorneys representing Colonel North concerning procedural matters during the pendency of the litigation.

Question No. 4:

Q. - The Subcommittee staff was told by Department of Justice personnel, prior to the hearings on March 19 and 20, that the Department had no documents containing explanations of the decisions of Attorneys General, since January 1, 1982, on whether to recuse themselves from proceedings under the independent counsel statute. At the hearing on March 19, Mr. Bolton testified that the search for these recusal documents was ongoing. Do you have any such documents? If so, please provide copies with your answers to these questions.

A. - Attached are copies of memoranda documenting the Attorney General's decision to recuse himself from participating in two independent counsel matters, as well as the Attorney General's general recusal policy. Also attached is a memorandum announcing the Attorney General's decision to recuse himself from any matter before the Department in which Miller, Cassidy, Larocca and Lewin represents any party or is otherwise involved. The Attorney General also recused himself in the matters involving Michael Deaver and Franklyn C. Nofziger, and one other matter that remains under seal. We would note that the attached materials are internal Department of Justice documents not intended for public release.



Office of the Attorney General
Washington, D. C. 20530

May 12, 1987

MEMORANDUM FOR CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

FROM: EDWIN MEESE III *RM*
Attorney General

SUBJECT: Recusal

I hereby recuse myself from participation in any matter before the Department in which Miller, Cassidy, Larroca & Lewin represents any party or is otherwise involved.

Please take appropriate action and notify affected components. Thank you.



Office of the Attorney General
Washington, D. C. 20530

2 April 1985

*A-2
Huskins*

MEMORANDUM FOR: Ralph Tarr
Acting Assistant Attorney General
Office of Legal Counsel

FROM: Edwin Meese III *Em*
Attorney General

I have decided to recuse myself from any matter within the Department involving former Secretary of Labor Raymond Donovan.

Please take appropriate action and notify affected components.

Thank you.



Office of the Attorney General

Washington, D. C. 20530

24 May 1985

MEMORANDUM FOR: Heads of Offices, Bureaus,
Boards and Divisions
All Personnel, Office of
the Attorney General

FROM: EDWIN MEESE III *EM*
Attorney General

SUBJECT: Recusal Policy

This memorandum sets forth my policy with respect to avoiding any conflicts of interest during my tenure as Attorney General.

I am recusing myself from participation in any of the following matters: (1) any matter involving John R. McKean; (2) any matter involving former Secretary of Labor Raymond Donovan; (3) any matter involving the retirement plans in which I have an interest, *i.e.*, the University of San Diego TIAA/CREF, the Alameda County Retirement Plan, and the State of California Public Employee Retirement System; (4) any matter involving the investigation by Independent Counsel Jacob Stein, or related matters such as my petition for reimbursement of attorneys' fees; and (5) any matter involving the law firms that represented me in the Independent Counsel's investigation (e. robert wallach, Esq., San Francisco, California and Dickstein, Shapiro and Morin, Washington, D.C.), at least until my liability to those firms for attorneys' fees reported on my SF-278 Financial Disclosure Report has been discharged. In addition, pursuant to 18 U.S.C., Section 208, I will disqualify myself from participation in any matter in which I have a financial interest within the meaning of that statute unless I obtain a waiver pursuant to Section 208(b). Finally, I will recuse myself from participation in any matter in which, in my judgment, it is desirable for me to do so in order to avoid an appearance of impropriety.

To assist you in identifying matters from which I may be disqualified, the entities in which Mrs. Meese or I have a financial interest are shown on Appendix A to this memorandum.

Steve Galebach, Senior Special Assistant in my office, will maintain a current list of my financial holdings and will screen all matters presented to my office to assure that any potential conflicts of interest are avoided. You should also be aware that I have divested myself of the stocks and bonds listed on Appendix B hereto, and I am accordingly no longer disqualified from participating in any matter involving those entities.

- 2 -

Any matter falling within the categories of matters from which I am disqualified should not be referred to or raised with me. Instead, such matters should be referred to Deputy Attorney General Jensen, who will either act on the matter or refer it to another appropriate official. Questions as to the nature or scope of my recusal policy should be referred to Ralph Tarr, Acting Assistant Attorney General, Office of Legal Counsel.

This policy is effective immediately.

Thank you for your cooperation.

APPENDIX A

Keystone Custodian Funds
National Permanent Federal Savings and Loan Accounts
White House Federal Credit Union Accounts
Manufacturers Life Insurance Company Policy
William Moss Institute (Mrs. Meese's client and former employer)

APPENDIX B

Arkansas Power and Light Bond
Columbia Gas System Bond
Los Angeles Housing Authority Bonds
Pacific Gas and Electric Bond
Southern California Edison Bonds
Allis-Chalmers Manufacturing
Central Banking System
Central Illinois Public Service
Consolidated Edison of New York
Consumers Power
Monarch Machine Tool
Niagara Mohawk Power
Safeway Stores
Santa Fe Southern Pacific
Southern California Edison (pref.)
Sterling Drug
AT & T
Ameritech
Bell Atlantic
Bell South
NYNEX
Pacific Telesis
SW Bell
US West
Exxon
Texaco
AT & T
New York Telephone Bond
Southwestern Bell Telephone Bond



Office of the Attorney General
Washington, D. C. 20530

3 April 1987

MEMORANDUM FOR CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

FROM: EDWIN MEESE III *EM*
Attorney General

SUBJECT: Recusal

Please be advised that I hereby recuse myself from participation in any Departmental matter involving the Welbilt or Wedtech companies, including E. Robert Wallach, Franklin C. Nofziger, or any other related individual. As you may recall, I have previously recused myself on this matter as it related to Mr. Nofziger and consideration of appointment of an Independent Counsel.

Please advise any affected components. Thank you.

Question No. 5:

Q. - In deciding whether to recuse himself from proceedings under the independent counsel statute, does Attorney General Meese currently employ a presumption against recusal?

As I explained in my testimony before the subcommittee on March 19, we believe that the general presumption should be that the Attorney General will not recuse himself from independent counsel matters. The Attorney General adheres to the same strict ethical standards in deciding matters relating to independent counsels as he does in any other matter that comes before him in his official capacity.

The standards governing recusal for Department of Justice officials, including the Attorney General, are set forth in the Department's regulations at 28 C.F.R. 735-4 and 5. These standards apply in independent counsel matters as in all other matters. However, recusal decisions under the independent counsel statute are necessarily different from recusal decisions in other settings.

The independent counsel statute is itself a recusal statute: its provisions are invoked precisely because of the statutory presumption that the entire Department of Justice has a conflict of interest that would require the Attorney General's disqualification in cases involving covered individuals. It is because of this presumed conflict of interest that the statute restricts the role the Attorney General may play in the investigative and prosecutorial process. Because Congress has already determined that the Attorney General should be permitted to perform that limited role even in cases where a conflict is presumed, the

standard governing disqualification decisions may be less restrictive in cases arising under the independent counsel statute than it is in cases in which the Department handles all aspects of the investigation and prosecution.

It must also be emphasized that because recusal decisions based on personal or professional relationships inherently involve questions of judgment, reasonable people may differ respecting the correctness or wisdom of any particular recusal decision. We believe, however, that in all of his decisions on independent counsel matters, the Attorney General has complied fully with applicable regulations.

Question No. 6:

Q. - On what date did Carol Dinkins leave her position as Deputy Attorney General with the Department of Justice? On what date was Edwin Meese sworn in as Attorney General?

A. - Department of Justice records reflect that Mrs. Dinkins formally severed her ties with the Department on March 3, 1985, shortly after the Attorney General was sworn in on February 25, 1985. However, we are informed that she tendered her letter of resignation to the President on February 25, 1985, and that her travel and moving schedule kept her out of Washington, D.C. much of the remaining period. We are in the process of acquiring more specific information on this point and will forward it to you as soon as possible.

Question No. 7:

Q. - Mr. Bolton testified that, in Dellums, Banzhaf and Nathan, the Department of Justice may have argued only procedural points and not the merits of the cases before the federal district court judges who issued findings on the substantive issues. The district court judges are Judge Greene and Judge Gesell of the U.S. District Court for the District of Columbia and Senior Judge Weigel of the U.S. District Court for the Northern District of California.

Did the Department of Justice present evidence or arguments to these judges on the merits of its determinations that the information supplied by the plaintiffs did not meet the standards in the independent counsel statute for specificity and credibility? Please produce copies of any briefs filed by the Department, before these judges, on this matter.

A. - Attached are Justice Department briefs filed in federal district courts in the above-named cases.

Question No. 8:

Q. - In a document dated July 12, 1982, Michael Shaheen of the Justice Department's Office of Professional Responsibility states that the Department was conducting a "preliminary investigation" under the independent counsel statute of then Attorney General William French Smith regarding questionable tax deductions and his failure to disclose a \$50,000 severance payment from a former employer. However, the independent counsel division of the U.S. Court of Appeals has no record of the report which the independent counsel statute requires to be filed at the conclusion of any preliminary investigation.

Did the Department of Justice conduct a preliminary investigation of Mr. Smith with respect to the tax deductions and severance payment? If not, please provide a detailed explanation why the information on these matters did not meet the specific, credible standard in the independent counsel statute. Also, given the public nature of these allegations, please produce all internal decisionmaking memoranda associated with this case.

A. - Investigation of the matters involving former Attorney General Smith, which took place prior to enactment of the amendments to the Ethics in Government Act in 1982, was handled by two different parts of the Department. The matter regarding the severance payment was handled by the Public Integrity Section of the Criminal Division under the Special Prosecutor provisions of the Act. The standard then in effect was whether the Department of Justice had received "specific information" that a covered person had committed a federal crime. At no time did the Department receive any information, allegation or evidence that Mr. Smith understood the severance payments at issue to be intended to supplement his salary as a federal employee; thus, the statute was never "triggered," and no preliminary investigation was conducted.

Questions relating to the tax deduction matter were referred to the Office of Professional Responsibility (OPR), since there was no allegation that Mr. Smith's actions were criminal in nature and, hence, no occasion to consider triggering the special prosecutor statute. Some confusion in this regard appears to have resulted from OPR's use of the phrase "preliminary investigation" in its memorandum. OPR's inquiry related solely to the propriety of Mr. Smith's claim of the tax deductions at issue.

We are attaching two Department of Justice memoranda which discuss these matters. As we stated to you in our letter of March 13, 1987, we are willing to respond to specific questions concerning the Department's handling of this and other similar matters in order to facilitate your review of the independent counsel statute. However, considerations of confidentiality preclude the generalized disclosure of internal investigative files.

Attachment to Question 8

REPORT OF THE DEPARTMENT OF JUSTICE
SUMMARIZING THE CRIMINAL DIVISION'S
FINDINGS AND CONCLUSIONS REGARDING
THE JOERGENSEN SEVERANCE PAYMENT
TO WILLIAM FRENCH SMITH

On May 7, 1982, Attorney General William French Smith filed a Financial Disclosure Report with the Office of Government Ethics reflecting the receipt of a \$50,000 Director's fee from the Earle M. Jorgensen Company ("the Company"). On May 14, 1982, in a letter to the Office of Government Ethics amplifying certain matters in the Attorney General's Disclosure Report, the Associate Attorney General explained that the \$50,000 Director's fee on the report was a severance payment to Mr. Smith from the Company "for his past services as a member of the Board of Directors." Shortly thereafter questions were raised in the press and elsewhere as to whether the severance payment violated 18 U.S.C. §209, which proscribes the supplementation of a government salary by non-government sources. Because of these questions, the Solicitor General directed the Criminal Division and the Federal Bureau of Investigation to undertake an investigation into the circumstances of the payment. Because the Attorney General, Deputy Attorney General and Associate Attorney General have recused themselves from this matter, the Solicitor General has served as Acting Attorney General for purposes of this case. That investigation is now complete. This Report sets forth a summary of the investigative findings and an analysis as to the applicability of 18 U.S.C. §209 and the Special Prosecutor provisions of the Ethics in Government Act. 28 U.S.C. §591, et seq.

Summary of Investigation

In order to ascertain the purpose of the severance payment, the FBI conducted interviews with each of the 14 members of the Company's Board of Directors who were present when the severance payment was voted. The attorneys who provided legal advice to the Company regarding the payment were also interviewed. Finally, Mr. Smith himself was interviewed. Following is a summary of the investigative findings:

William French Smith was named to the Board of Directors of the Earle M. Jorgensen Company in 1975. At the time he was a partner in the law firm of Gibson, Dunn & Crutcher, which did not represent the Company as outside counsel. The Company is a highly successful steel producer with some 2,000 employees and plants in over a dozen cities throughout the United States. Earle M. Jorgensen is the founder of the Company and presently

serves as Chairman of the Board and Chief Executive Officer. Between March 1975 and January 1981, Mr. Smith attended 25 of 26 Board of Directors meetings. In March of 1978, Mr. Smith was also appointed to serve on the Company's Audit Committee and he attended five of the six Audit Committee meetings held prior to his resignation in January 1981. It was the general feeling of the other Directors that Mr. Smith made invaluable contributions to the Company through his service on the Board and the Audit Committee.

On January 2, 1981, after the President announced an intention to name him Attorney General, Mr. Smith sent a letter to Earl H. Jorgensen resigning his position on the Board of Directors. On January 6, 1981, the Company's five-member Executive Committee unanimously voted to recommend to the Board of Directors that a \$50,000 severance payment be made to Mr. Smith in recognition of his past service to the Company. Advice was obtained from the law firm of O'Helvey & Myers that the payment would be proper as long as it was intended to compensate Mr. Smith for past services.

At the Board of Directors meeting on January 12, 1981, the Executive Committee's recommendation of a \$50,000 severance payment to Mr. Smith was unanimously approved by the Board. The resolution granting the \$50,000 payment read as follows:

RESOLVED, that Mr. William French Smith be paid by the Company a sum in the amount of \$50,000 severance pay for his loyal and dedicated past service to the Company as a member of its Board of Directors and Audit Committee.

Mr. Smith stated that he knew nothing of the payment until he actually received it and that he accepted the payment as a fee for past services. Mr. Smith was informed on January 12 that the legality of the payment had been approved by the Company's outside counsel.

The Company had no set policy and few precedents for determining severance payments for outside Directors. In the past, whenever an outside Director resigned from the Board the question of a severance payment was considered on the individual facts of each case. The few outside Directors who had departed the Company in the past had received severance payments ranging from very expensive gold watches to the continuation of regular

- 3 -

Director's fees for life, which resulted in a total payment of approximately \$25,000. Mr. Smith's situation was unique, however, when compared to the other outside Directors who had resigned from the Board. First it was the general feeling of the Board that the nature of Mr. Smith's contributions to the Board and the Company were highly significant and valuable. Typical was the statement of Earle M. Jorgensen:

Attorney General Smith's value in dollars was well beyond the amount of the remuneration he received for his service on the Board of Directors and the Audit Committee. [I]f the company had paid for the fair value of the benefit of his legal advice alone, the bill would have far exceeded the \$50,000 severance pay given him. Attorney General Smith was a "bargain" for the Jorgensen Company for what he contributed in the way of services as a member of the Board and the Audit Committee.

Second, Mr. Smith was the first outside Director of the company who did not otherwise have a business or financial relationship with the Company. While other outside Directors had profited from their relationship with the Company, Mr. Smith had received nothing beyond his Director's fees. One outside Director, whose law firm was outside counsel to the Company explained this factor:

[T]he intent of the Board of Directors was to recognize Mr. Smith's contribution to the company over and above that which he had been paid in fees as a member of the Board of Directors and the Audit Committee. . . . [U]nlike members of the Board who were also officers of the company or had a business relationship with the company and were making money from it aside from their fees as Board members, Smith received nothing from the company other than these fees. It thus appeared appropriate to give him a severance payment of this type and \$50,000 was considered reasonable on the basis of past services rendered by Smith.

Thirteen of the fourteen Directors stated unequivocally that the payment was intended to compensate Mr. Smith for past services, and was not motivated by his future government employment. One of the Directors said Earle Jorgensen told him in a private conversation that Mr. Smith's situation was different from other resigning Directors because Mr. Smith would be making a financial sacrifice in accepting public service. However, there is no other evidence that this factor motivated the Board and no evidence whatsoever that the Board sought to supplement Mr. Smith's government salary rather than compensate him for past services. There was no evidence whatsoever that Mr. Smith was told anything other than that the payment was intended as compensation for past services.

Analysis

16 U.S.C. 5209

Section 209 bars the receipt from private sources of "any salary or any contribution to or supplementation of salary as compensation for his services as an officer or employee of the executive branch of the United States Government" There is no pertinent case law under Section 209 or its predecessor and there has never been a prosecution instituted under Section 209 involving a payment such as the one at issue. What is clear from both the words of the statute and the legislative history is that the intent of the payment is crucial. If the payment was intended to supplement the salary of a government official, it violates Section 209. If the intent was to compensate for past services, the payment would be proper.

Although there have been no pertinent prosecutions under Section 209, the statute has been interpreted numerous times by the Department's Office of Legal Counsel (OLC) in the context of passing on proposed severance payments to entering officials who seek advice. Typically, an entering official will describe a proposed severance payment to OLC and OLC will issue an advisory opinion deciding whether or not the proposed payment is consistent with the proscription in Section 209.

In issuing their opinions, OLC relies on certain objective criteria rather than conducting an investigation into the subjective intent behind the payment. This practice is both necessary and appropriate because OLC does not have investigative resources and because it is concerned with the appearance of the transaction as well as the actual intent. Thus, although the OLC opinions are both authoritative and extremely useful statements on the scope of Section 209, they are not conclusive in the context of a criminal investigation when it is necessary to determine whether the proscribed intent is actually present.

When viewed in the context of criminal liability and with the benefit of a full investigation into the purpose of the payment, it is clear that the payment did not, in fact, violate Section 209. Put simply, the direct evidence supports the conclusion that the payment was, in fact, intended to compensate Mr. Smith for past services.

Regarding the liability of Mr. Smith under Section 209, there is no direct evidence that he received this payment as a supplement to his government salary. Mr. Smith's first knowledge of the payment was when it was presented to him at the January 12 meeting with an explicit statement and resolution that it was for past services. In addition, given (a) Mr. Smith's highly valued contribution to the Company over a six-year period, (b) the extreme profitability of the Company, (c) the relationship of the payment to Mr. Smith's overall income, and (d) the statement of each Director that the fee was, in fact, voted for past services, there is simply no basis to conclude that Mr. Smith accepted the payment with the understanding that it was supplementing his future government salary rather than paying him for past services. Even if one or more of the Directors was motivated in part by Mr. Smith's diminished government salary, such was never communicated to Mr. Smith and the objective circumstances are insufficient to attribute such knowledge to Mr. Smith. In any event, the overall evidence regarding the intent of the Directors supports only one conclusion -- that the payment was intended to compensate for past services, not to supplement Mr. Smith's salary. When applying the standards of the criminal law to the facts, the evidence does not indicate a violation of Section 209 by Mr. Smith.

Special Prosecutor Provisions

The Special Prosecutor provisions of the Ethics in Government Act, 28 U.S.C. §591, et seq., are triggered by receipt of "specific information" that a person covered by the Act has committed a federal offense. 28 U.S.C. §591(a). As Attorney General, William French Smith is a person covered by the Act. 28 U.S.C. §591(b)(2) and (4). It was thus necessary to determine whether the information regarding the severance payment is specific information that Mr. Smith committed a federal crime. For purposes of deciding whether the Special Prosecutor Act is applicable, it is not determinative if the information reflects a possible violation by persons other than Mr. Smith. Thus, even if there is information that one or more of the Directors harbored the proscribed intent in voting for the payment, it would be irrelevant unless there was some information that Mr. Smith was reasonably aware that the proscribed intent was present.

At no time have we received any information, allegations, or evidence supporting a conclusion that Mr. Smith understood, believed or knew that the Jorgensen payment was intended to supplement his salary. While the objective circumstances known prior to the investigation perhaps presented the sort of appearance problems that the Office of Government Ethics is normally and properly concerned with when it renders its advisory opinions, there was no specific information, credible or otherwise, that Mr. Smith accepted the payment with the prescribed knowledge and intent. The information developed during the investigation failed to support a reasonable inference of the requisite intent or knowledge and thus at no time has the Act been triggered.

Conclusion

Because the evidence fails to establish that the Jorgensen payment was intended to compensate Mr. Smith for his future government service as Attorney General, this matter does not warrant further investigation or prosecution. Because the Department of Justice has not received "specific information" of a federal offense by Mr. Smith, the Special Prosecutor provisions of the Ethics in Government Act are inapplicable.



U.S. Department of Justice

Office of Professional Responsibility

JUL 19 1982

Washington, D.C. 20530

MEMORANDUM TO: Rex E. Lee
Solicitor General

FROM: Michael E. Shaheen, Jr. *ME Shaheen*
Counsel
Office of Professional Responsibility

SUBJECT: The Attorney General's Investments
in Yale-Quay Energy Partners and
Blackhawk Energy Partners, Ltd.

This Office recently concluded a review of the Attorney General's participation in two investment programs, known as the Yale-Quay Energy Partners (Yale-Quay) and Blackhawk Energy Partners, Ltd. (Blackhawk), which have as their ultimate goal the production of domestic oil and gas. Both are limited partnerships. Both, when they were created, offered investors the benefit of shielding from taxation more ordinary income than the original investment. ^{1/} In one of the two instances, the Attorney General elected to participate subsequent to assuming office: he made his initial investment in Yale-Quay on November 27, 1981. The first Blackhawk payment was made on December 17, 1980, a few days after his proposed appointment was publicly announced. The Attorney General made both of these investments with the advice of tax counsel--Meserve, Mumper, and Hughes of Los Angeles--and outside the qualified diversified trust he created to manage the large majority of his assets. Because the Attorney General made his initial investment in Blackhawk prior to his appointment, this Office concluded that it was not covered by the Standards of Conduct. Therefore, the remainder of this report addresses only the Yale-Quay investment.

^{1/} This benefit is accomplished through the calculation of "intangible drilling costs" and through a commitment by the partnership to pay to the lessor of the tracts where drilling is to occur a stated minimum royalty payment during the term of the lease regardless of the success of exploration activities. Both of these items are treated as front-end costs of doing business and, hence, under the accrual method of accounting, they are also treated as immediately deductible. The Attorney General invested \$25,000 in Blackhawk, half of which he paid on December 17, 1980 and half in March 1981. Based on that investment, the Attorney General claimed tax deductions of \$51,000 in 1980 and \$25,800 in 1981. To participate as a limited partner in Yale-Quay, the Attorney General paid \$16,500 on November 27, 1981 and the same amount on March 30, 1982. His tax return for 1981 claimed a deduction of \$66,000 for the first payment and, in 1982, he claimed \$33,000.

Following press accounts calling into question the legality^{2/} and propriety of these investments, this Office received a complaint alleging that the Attorney General may have violated 28 C.F.R. §45.735-11, which prohibits a Departmental employee from investing:

(a) In enterprises which it is reasonable to believe will be involved in decisions to be made by him, (b) on the basis of information which comes to him by reason of his status as a Department of Justice employee and which has not become part of the body of public information or (c) which are reasonably likely to create any conflict in the proper discharge of his official duties.

The applicable provision for purposes of this inquiry is part (c). After we had received this complaint, the Attorney General announced on May 28, 1982, that he would forego all deductions deriving from Blackhawk and Yale-Quay which "will exceed the actual cash invested." Further, he stated that: "I will recuse myself from any decisions involving the tax treatment of investments in energy drilling programs. Of course, I will also continue my existing policy of disqualifying myself from the resolution of any issues that might arguably give rise to the appearance of a conflict."

Except insofar as it exonerates him of criminal misconduct, the scope of this inquiry does not comprehend passing on the substantive tax aspects of the Attorney General's investments.

^{2/} A brief preliminary inquiry determined that the Attorney General suffered no potential criminal liability as a result of these investments. Roughly stated, the Department pursues criminally only those "tax shelters" which are fraudulent in nature, e.g., those created solely to achieve tax savings, those entered into with the specific knowledge that the economic asset underlying the original investment is grossly and intentionally overvalued or non-existent, and those which involve the backdating or forging of documents so as to achieve impermissible deductions. No such allegations have been made against Yale-Quay or Blackhawk. For that reason, we severed this matter from inclusion with the allegations involving the Jorgensen severance payment, which was referred to the Criminal Division for the preliminary investigation prescribed by the provisions of the Special Prosecutor Act.

Our inquiry can be resolved without reaching the merits of the tax questions raised by the structure of Yale-Quay. Put simply, the operative question under the Department's Standards of Conduct is whether the Attorney General knew or should have known that this investment--whatever the ultimate determination of its legitimacy as a shield for income--would create a conflict with his official duties. If the answer to this question is affirmative, then a second question is presented for consideration--whether his voluntary relinquishment of both the claimed and anticipated tax benefits flowing from this investment cures the problem created by his participation.

The first question must be answered in the affirmative. Among the Attorney General's duties is the supervision of the Tax Division. That Division's chief responsibility is to represent the Internal Revenue Service in the courts of the United States. In at least one revenue ruling the Internal Revenue Service objected to the very method employed by Yale-Quay to calculate tax benefits. See Revenue Ruling 80-70, 1980-1 Cumulative Bulletin 104. The Attorney General received notice of the Service's position in the tax opinion prepared by Meserve, Mumper, and Hughes for Yale-Quay. By electing to go forward with the investment despite the ruling, the Attorney General breached the Standards of Conduct provision which proscribes investments by a Department employee "which are reasonably likely to create any conflict in the proper discharge of his official duties." 28 C.F.R. §45.735-11(c).

The Meserve, Mumper, and Hughes opinion carefully lays out the Service's position. It goes on to point out that the ruling at issue was later implicitly called into question by two decisions of the United States Court of Appeals for the Ninth Circuit.^{3/} Those

^{3/} See Van Raden v. Commissioner, ___ F.2d ___, 81-2 USTC ¶9547 (9th Cir. July 31, 1981); Zaninovich v. Commissioner, 616 F.2d 429 (9th Cir. 1980); rev'ing Commissioner v. Zaninovich, 69 T.C. 605 (1978). In Zaninovich, the Tax Court disallowed deductions claimed by a lessee for rental fees over a twelve-month period which he paid in full in the year he claimed the deduction, but which were attributable to two separate taxable years. The Tax Court held that the rental payments could only be deducted ratably over the period of the lease. Reasoning that the Tax Court's holding compelled the position that "[r]entals may be deducted as such only for the year or years to which they are applied," the Service ruled in Revenue Ruling 80-70 that, regardless of whether the taxpayer used the cash receipts and disbursements method of accounting or the accrual method of accounting, an advanced mineral royalty resulting from a minimum royalty provision which covers a

(Footnote continued on next page.)

decisions led Meserve, Mumper, and Hughes to the "opinion that Rev. Rul. 80-70 is incorrect." That opinion, upon which the Attorney General reasonably relied in making his investments, does not alter our conclusion. As the nation's chief law enforcement officer, the Attorney General has himself acknowledged that he does not stand in the shoes of the average investor. Moreover, he acknowledged in his May 28th statement that a substantial public trust is reposed in his office and that he is to be measured against the highest standard. The existence of Revenue Ruling 80-70, the validity of which the Service continues to assert, dictates our finding that the Attorney General should not have invested in Yale-Quay.

The Attorney General subsequently took voluntary steps sufficient in our view to cure the substance of this regulatory violation. By electing to forego all tax benefits flowing from Yale-Quay and Blackhawk which exceed his actual capital outlay, and by recusing himself from any decisions involving the tax treatment of energy drilling investments, the Attorney General has resolved the conflict which would otherwise have existed between his private investments and his public responsibilities. Accordingly, no further action need be taken regarding these investments, and we recommend that you consider this matter closed.

3/ (Continued.) twelve-month period extending beyond the taxable year is not fully deductible during that taxable year. "Only that portion of an advanced minimum royalty paid or involved that is properly attributable to the current taxable year is deductible...."

Meserve, Mumper argues that the Ninth Circuit's reversal of the Tax Court in Zaninovich leaves the ruling, building as it does on the validity of the Tax Court's position to reach the broader questions presented by Yale-Quay, without a logical or a persuasive basis. In Zaninovich the Ninth Circuit adopted "the 'one-year'" rule, 616 F.2d at 632, permitting the taxpayer to deduct in full his payment of rental fees for a twelve-month period even though the period extended into the next taxable year. That holding was reaffirmed in Van Raden.

Question No. 9:

Q. - When the Department of Justice was investigating John McKean, member of the Postal Board of Governors, was consideration given to seek an independent counsel under 28 U.S.C. 591(c)? If not, why not? What standards does the Department of Justice use in determining whether or not to apply 28 U.S.C. 591(c)? Did Attorney General Meese consider recusing himself from this investigation? Upon what basis did he decide not to recuse himself?

A. - No consideration was given to appointment of an independent counsel in the investigation of John McKean. Mr. McKean is not among the individuals covered by the independent counsel statute, see 28 U.S.C. 591(b), and there was no reason to invoke the special "catch-all" provisions of 28 U.S.C. 591(c) in his case. Section 591(c) provides that the procedures of the independent counsel statute may be invoked "if the Attorney General determines that investigation of [any person not otherwise covered by the Act] by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest." (Emphasis added.) Attorney General Meese recused himself from participation in this investigation on grounds of his personal relationship with Mr. McKean (see attached memorandum dated March 20, 1985), but there was no suggestion that other officers of the Department had any disqualifying conflict in Mr. McKean's case that would warrant invoking section 591(c).



Office of the Attorney General

Washington, D. C. 20530

March 20, 1985

A. H. Tarr

MEMORANDUM FOR RALPH TARR

Acting Assistant Attorney General
Office of Legal Policy

FROM:

EDWIN MEESE III *EW*
Attorney General

I have determined to recuse myself from participation in any matter before the Department involving John R. McKean. Please include this item in the recusal statement to be circulated throughout the Department.

Thank you.

Question No. 10:

Q. - According to the reports filed by the Department of Justice with the Special Court in the matters of Ambassador Faith Whittlesey and Edward Schmults, the decision not to seek an independent counsel is based on the determination that there is the absence of a reasonable prospect of conviction. Is the basis for making that determination Part B.2. of the Principles of Federal Prosecution?

A. - As I stated in my testimony, the Principles of Federal Prosecution, published in July of 1980, are the established policy of the Department. The principle articulated in Part B.2., that a case must have a good foundation in fact and law and a reasonable prospect of conviction in order to be brought, was employed in both the Whittlesey and Schults matters.

Question No. 11:

Q. - If the President ordered Independent Counsel Lawrence Walsh to grant immunity from criminal prosecution to Lt. Col. North and Mr. Walsh refused to do so, is it the opinion of the Department of Justice that the President would be able to meet the "good cause" requirement for removal in the independent counsel statute were he subsequently to fire Mr. Walsh?

A - For the reasons stated in detail in my testimony before this subcommittee on March 19, and in my April 23 testimony in the House, we believe that the answer to this question is affirmative; an independent counsel must follow the lawful direction of the President. We might point out, as a purely technical matter, that the sort of immunity you seem to be describing in your question - immunity from prosecution (often referred to as transactional immunity) as opposed to testimonial or use immunity - could be effectively conferred by the President himself through the exercise of his pardon power.² However, as the court in In re Olson clearly recognized in its citation of The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482 (1831), if the President does choose to take the latter course, a prosecutor must comply with the President's direction of his discretion on pain of dismissal.

² The President's constitutional power to "grant Reprieves and Pardons for Offenses against the United States," Art. II, sect. 2, cl. 1, includes the power to grant amnesty or immunity from prosecution. See United States v. Klein, 80 U.S. (13 Wall.) 128 (1872) (President's power to offer amnesty to former rebels); 20 Op. Att'y Gen. 330 (1892) (President's power to extend general amnesty to persons residing in Utah who had been guilty of polygamy).

Question No. 12:

Q. - Does the Department of Justice take the position that the commissioners of the independent regulatory agencies must -- for constitutional purposes -- be removable at will and not for cause?

We do not understand the relevance of this general question to our testimony on the reauthorization of the independent counsel statute. Our testimony addressed only the removal of an independent counsel under this law and in this specific context. The Department will, of course, respond fully to questions relating to the President's removal power under other statutes and in other situations, when the appropriate occasion presents itself.



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

3 June 1987

Honorable Carl M. Levin
Chairman
Subcommittee on Oversight of
Government Management
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In our transmittal letter to you of May 21, 1987, we indicated that we were awaiting additional information which would enable us to respond fully to one of the questions posed by the Subcommittee following my testimony on the Independent Counsel statute on March 19, 1987.

The particular question, Question 6, asked the date on which Carol Dinkins left her position as Deputy Attorney General and the date on which Edwin Meese was sworn in as Attorney General. We responded that, while Mrs. Dinkins formally resigned on March 3, 1985, she had tendered her resignation to the President on February 25, 1985, the same day Mr. Meese was sworn in as Attorney General, and had been absent from Washington, D.C. during at least part of the interim period. We have since spoken more extensively with Mrs. Dinkins and have received the following schedule of her activities during her last days with the Department in 1985.

Her calendar reflects that her letter of resignation was dated February 25, 1985 and contained an effective date of March 5, 1985. Mrs. Dinkins stated further that when Mr. Meese was beginning his confirmation process in December 1983, she indicated to him that she would be leaving immediately upon his confirmation, and did not intend to remain during the transition period.

Mrs. Dinkins' calendar shows a meeting with Messrs. Meese and Webster in the Attorney General's conference room on Monday, February 25, 1985, followed by lunch with Mr. Meese at the White House, where she was introduced to the President by Mr. Meese. On Tuesday, February 26, 1985, Mrs. Dinkins' calendar shows a "get acquainted" meeting with Mr. Meese in the morning and lunch in the Attorney General's dining room. She recalls Mr. Meese being present in the dining room only briefly. The Attorney

General later made brief remarks at a farewell party held for her that evening from 4 to 6:30 p.m.

Mrs. Dinkins' calendar also indicates that she met with the Attorney General on February 27, 1985 at 8:45 a.m. and with the Attorney General and his staff at 9 a.m. During the later meeting, she made recommendations concerning which staff members ought to remain, and recalls that the meeting was very brief. Her calendar also reflects a 12:45 p.m. Attorney General dining room lunch, but she does not remember whether Meese appeared. She went to Dulles airport at 3:15 that afternoon to fly to Houston, where she remained until March 1, 1985.

On March 1, 1985, Mrs. Dinkins flew to Denver, Colorado in order to give a speech at Keystone, Colorado, and returned to Washington, D.C. on March 3. She did not see the Attorney General again until March 5, 1985, when she attended an 8:45 a.m. staff meeting and briefly said good-bye to him at 9:15 a.m. that same morning.

During this period, Mrs. Dinkins had no substantive contact whatsoever with the Attorney General, and she was absent from Washington, D.C. for four of the nine day overlap period. Please contact me if you have further questions.

Sincerely yours,



John R. Bolton
Assistant Attorney General

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March 13, 1987

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Honorable Carl Levin
Chairman
Subcommittee on Oversight
of Government Management
United States Senate
Committee on Governmental Affairs
Washington, D.C. 20510-6250

Dear Senator Levin:

Thank you for your letter of February 11, 1987, regarding Title VI of the Ethics in Government Act, 28 U.S.C. 591-98. I followed the standard as attorney general of recusing myself whenever the circumstances were such as would make it appear that it would be improper for me to participate in a matter. This "appearance of impropriety" is a stringent standard, but one that serves the office well. I did recuse myself in a number of instances.

In the event of a recusal by the attorney general, the matter simply follows the chain of command downward until it reaches someone who can handle it free of an appearance of impropriety. This did not amount to a problem during my tenure as attorney general. As you know, there are many career people in the Department of Justice, and there is never any problem of finding someone to handle a matter, whether it is an investigation or a prosecution.

Given my views and the practice that I followed, I never thought it advisable to have a statutory special prosecutor or special counsel provision. I must concede, though, that on one occasion I did appoint a special counsel when such an appointment was not necessary under the law. That was in the investigation of the Carter peanut warehouse. You will perhaps recall that Paul Curran was appointed as special counsel to see if campaign funds had been laundered through the Carter warehouse. The result that no such laundering had taken place was well received and perhaps better received because of the perception that Mr. Curran was acting independently of the Department. My problem with the special prosecutor or special counsel approach is one of accountability. Special counsel never

Honorable Carl Levin
March 13, 1987
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really reports to anyone other than with a prosecutorial decision conclusion. On the other hand, the attorney general or those under him at the Department are subject to the oversight of the Congress as well as to all of the rules and regulations of the Department.

I do not think it necessary to put the standard for recusal in a statute, but I do believe that it should be clear that such a standard is to be included in the regulations at the Department and then followed.

All good wishes.

Sincerely,



Griffin B. Bell

GBB:jqs

WILLIAM FRENCH SMITH
333 SOUTH GRAND AVENUE
LOS ANGELES 90071

February 26, 1987

Senator Carl Levin
Chairman, Subcommittee on
Oversight of Government Management
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Senator Levin:

Thank you for your letter requesting my views concerning the Attorney General's recusal from Title VI cases (28 U.S.C. 591-98). I am glad to respond.

Before addressing your specific inquiry I believe I should give you my views concerning the Act as a whole. I do so as the Attorney General who has dealt with it longer than any in that position to date.

In my opinion this legislation has not served the ends of justice, is cruel and devastating in its application to individuals - falsely destroying reputations and requiring the incurring of great personal costs, has applied artificial standards unrelated to culpability and to that extent has prevented the use of normal standards of prosecutorial discretion, has been used more for political purposes and media appetite than to achieve justice, has been a nightmare to administer, and has caused a needless and substantial waste of taxpayers' money. Because of the high profile nature of the cases involved, the independent counsel selected have felt it necessary to undertake massive investigations, delving into minute detail and wholly irrelevant trivia. This

Senator Carl Levin
Chairman, Subcommittee on
Oversight of Government Management
Committee on Governmental Affairs
February 26, 1987
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has required the establishment of legal and investigative bureaucracies and has resulted in the process being drawn out to from five months to almost a year - and this at tremendous personal anguish to individuals and great cost to the taxpayers.

Nor is there any historical justification for such legislation. Whenever in the past it has been necessary to have a special prosecutor one has been appointed - from Teapot Dome to Watergate - and without the need for any special legislation. I have found no effort whatever among the prosecutorial and investigative career personnel in the Department of Justice under whatever circumstances to do anything other than act professionally regardless of the rank of the official involved. Indeed if there is any tendency it is to lean over backwards the higher the position involved. This applies to the politically appointed officials as well.

Furthermore the Act is probably unconstitutional. My view on this subject was stated in a letter I sent to Congress early during my tenure and before any proceedings had been initiated under the Act during this Administration. The Act essentially is an effort to deprive the President of authority given him by the Constitution.

If after reading the foregoing - which I defy any rational person directly knowledgeable in the administration of the Act to rebut on the specifics - you are still interested in my views on your particular inquiries - they are as follows:

I believe that the Attorney General should recuse himself only in the most extraordinary circumstances. By definition the group intended to be covered are high government officials and ones that the Attorney General - and indeed most of his principal subordinates will know and work with on a regular basis. Neither

Senator Carl Levin
Chairman, Subcommittee on
Oversight of Government Management
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he nor any other appropriate official could act if these relationships were disqualifying. The system established by the Act requires that absent unusual circumstances the Attorney General must exercise this responsibility. Making decisions of this kind must be vested in a top level official and the Attorney General is the only logical one. (What are extraordinary circumstances? An example I suppose would be where a spouse, close relative, or intense personal relationship was involved.)

Insofar as I am aware every Attorney General so far has exercised this function responsibly. In none of the three publicized cases that occurred during my tenure did I recuse myself. Each of the three involved cabinet-level colleagues, two of whom I had known for some time. In two of the three cases I requested that an independent counsel be appointed, applying of course the standards established by the Act. I would have been happy not to have had to make any of the decisions. But to do otherwise would have been to avoid a responsibility that of necessity under the Act has to be placed on the Attorney General.

In each case I had the results of the investigation and analysis of the Criminal Division career professionals and of those with long experience in criminal law enforcement - although the analysis involved the application of the specific and artificial criteria established by the Act - not the exercise of normal prosecutorial discretion.

The Act essentially is an effort to legislate morality. It has not achieved and cannot achieve that goal. Whether to recuse oneself in this or any other situation is essentially a judgment call. It is a decision that every government official must make from time to time. Some cases are obvious; many are not. Attempting to prescribe by rules, standards and regulations how to exercise this judgment in doubtful cases in my view would be futile and unwise - another

Senator Carl Levin
Chairman, Subcommittee on
Oversight of Government Management
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artificial effort to legislate an ethical standard. If an Attorney General cannot properly exercise that responsibility he should not be in office. In that case removal or impeachment is the remedy.

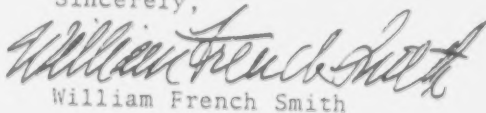
I might say that in most if not all of the cases the Attorney General would actually prefer to recuse himself and thus avoid the responsibility for making a difficult and sometimes distasteful decision. The onerous aspect is that he cannot and should not except in very unusual circumstances. If he is not to do so who is going to be in the pristine condition to take his place?

In other situations I was careful to recuse myself whenever there was even a possible conflict involved or the appearance of a conflict. As do others I resolved every doubt in favor of recusal. The context created by the Act however I believe imposes a responsibility which prevents recusal in all but the unusual case. I do not believe that standards for recusal should be attempted and that to do so would add more artificiality to an already artificial statute.

In the event the Attorney General should recuse himself I believe the Deputy Attorney General should assume the decision-making authority; if both are recused then the Associate Attorney General.

The foregoing I recognize is probably more than you asked for but I hope is responsive to your inquiry. If not, I shall be glad to elaborate.

Sincerely,


William French Smith



United States
Office of Government Ethics

P.O. Box 14108
Washington, D.C. 20044

DEC 15 1986

Mr. Michael E. Shaheen, Jr.
Office of Professional Responsibility
Department of Justice
Constitution Avenue & 10th Street, N.W.
Room 5214
Washington, D.C. 20530

Dear Mr. Shaheen:

We have been monitoring the circumstances at the Department of State involving Ambassador Faith Ryan Whittlesey's use of that Department's unconditional gift funds. We have now had an opportunity to review the Attorney General's report to the United States Court of Appeals concerning the allegations against Ambassador Whittlesey.

Please advise whether any determinations pursuant to either 28 CFR Part 45.735-4 or 28 U.S.C. § 528 were made as to a personal or political conflict of interest, or the appearance thereof, based either on Attorney General Meese's prior professional relationships with Ambassador Whittlesey, or the allegation that an expenditure from Ambassador Whittlesey's gift fund was for the benefit of the Attorney General and his staff. If such documentation does exist, I would appreciate copies as well as any background information used in developing the necessary findings.

I would appreciate a response at your earliest convenience.

Sincerely,

David H. Martin
Director



U.S. Department of Justice

Office of Professional Responsibility

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2

Washington, D.C. 20530

FEB 20 1987

David H. Martin
Director
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

Dear Mr. Martin:

This is in response to your December 15, 1986 letter to this Office asking if we are aware whether any conflict of interest determinations have been made regarding the Attorney General's role in the Ambassador Faith Ryan Whittlesey matter. We apologize for the delay in responding.

We have initiated a review throughout the various Department of Justice components that were, or may have been, involved in this matter. Once that review has been completed, we will contact you with our findings.

We appreciate your interest in this matter.

Sincerely,

Michael E. Shaheen Jr.
Counsel



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

8 July 1987

Mr. David H. Martin
Director
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

Dear Mr. Martin:

I am writing in response to your inquiry concerning the Attorney General's role in the Ambassador Faith Whittlesey matter.

As I have stated before, the Attorney General's previous acquaintance with Ambassador Whittlesey was not extensive, and did not impair his ability to make an impartial judgment in the matter. In fact, his decision not to recuse himself raised no appearance of impropriety, and was made routinely when he first learned of the allegations against her.

It is worth noting that in this situation, the Attorney General's role resembles that of a member of Congress sitting on the Committee on Standards of Official Conduct and reviewing charges lodged against a colleague. Furthermore, the Attorney General's decision not to seek an independent counsel parallels conclusions reportedly reached by the Subcommittee on International Relations of the House Foreign Affairs Committee after its investigation of the facts, including eight hours of interviews with Ambassador Whittlesey herself.

I hope that this information addresses your concerns with regard to the Attorney General's role in the matter. I also enclose a portion of my testimony before the Subcommittee which explains the Attorney General's decision.

Sincerely,

John R. Bolton
Assistant Attorney General

[From "Trusts and Other Conflict of Interest Matters," hearings, Senate Governmental Affairs Committee, May 3, 4, 5, and June 7 and 9, 1977, 95th Congress]

EXCERPT FROM THE PREPARED STATEMENT OF JOHN HARMON, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE (UNDER PRESIDENT JIMMY CARTER)

Mr. Chairman and Members of the Committee: I am pleased to appear today to provide the views of the Department of Justice on Titles I and II of S. 555, the Public Official Integrity Act of 1977. We support the principles underlying these titles which would provide for the appointment of a temporary special prosecutor and create an Office of Congressional Legal Counsel.

With respect to Title I, our support for the special prosecutor provision of the bill should not be misunderstood by this Committee or by the American people as any indication that the Department of Justice cannot or would not forcefully and effectively prosecute even the highest officials of the Executive Branch where there was evidence of criminal wrong-doing. To the contrary, our first duty is to our first client, the American people and the Constitution. And let there be no question that this Department of Justice stands ready to enforce the laws of the United States, fairly and firmly, against all who would violate those laws, no matter what their office or position.

However, we recognize that public perceptions and the appearance of justice are often as important as justice itself. We also recognize that in light of Watergate and its aftermath public confidence in our system of justice must be restored. We must not only do justice, but be able to assure the public that justice has been done. It is in this spirit that I come here for the Department of Justice to support the principles underlying the special prosecutor provision of S. 555.

With regard to Title II and the creation of an Office of Congressional Legal Counsel, the Department of Justice recognizes that the basic decisions whether to establish such office and what structure the office or offices should take are policy questions for Congress to decide. It would be inappropriate for the Department of Justice to enter the debate over those threshold policy questions. However, we do believe that it might be useful in your consideration of the policy issues to know that the Department does not oppose the establishment of an Office of Congressional Legal Counsel in principle and that after reviewing the powers provided in the bill we believe, except for the power of intervention, the Congress might legitimately vest those powers in the Office. Therefore, I am here today to support the basic principles underlying both the special prosecutor and the congressional counsel provisions of S. 555.

There are, however, particular aspects of both Titles I and II which either pose constitutional problems or which would be detrimental to the fair and efficient administration of justice. While the Department generally supports the proposals here, we believe that the deletion or modification of certain problematical provisions will result in a bill which is both more workable and less subject to constitutional objections.

TITLE I

1. Special Prosecutor.—In essence, Title I provides for judicial appointment of a temporary special prosecutor in instances where the Attorney General receives a non-frivolous allegation that certain specified persons have violated any Federal criminal law. More particularly, the bill requires the Attorney General to conduct an investigation whenever he receives "specific information" that the President or Vice President, individuals serving at Level I or II of the Executive Schedule, certain high-level officials working in the Executive Office, the Director of the FBI, and certain campaign personnel have violated any Federal criminal law. If, after a period not to exceed sixty days, the Attorney General determines that the "matter is so unsubstantiated that no further investigation or prosecution is warranted," he shall so notify a special court of three judges chosen by the chief judge of the United States Court of Appeals for the District of Columbia; the court would then have no power to appoint a special prosecutor. If, however, the Attorney General finds that the matter warrants further investigation or prosecution (or sixty days elapse without any determination by the Attorney General), he is required to apply to the court for appointment of a special prosecutor. This same action is required of the Attorney General where he determines that a pending investigation or any resulting prosecution "may so directly and substantially affect the political or personal interests of the President or the Attorney General or the interests of the President's po-

litical party as to make it inappropriate in the interest of the administration of justice for the Department of Justice to conduct such investigation." Upon receipt of the Attorney General's application, the court is required to appoint a special prosecutor and to define the special prosecutor's jurisdiction.

The special prosecutor is given broad power to hire a staff, to conduct investigations and prosecutions, and to secure access to pertinent Department of Justice records and resources. He is obliged to submit reports to Congress and to "cooperate with the exercise of . . . oversight jurisdiction" by the appropriate committees of Congress. He may be removed from office, other than by impeachment and conviction, by the Attorney General but only for "extraordinary improprieties" or similar conduct. The bill also provides for the termination of the special prosecutor's office upon the completion of its assigned tasks.

As I have already indicated, the Department of Justice endorses the concept of resort to a temporary special prosecutor in extraordinary circumstances. We also support the general approach adopted in this bill. The Department has no objections to the manner in which the appointment process is initiated, the method of judicial appointment, or the restrictions placed on the Executive's power of removal over the special prosecutor.

In view of the departure which this bill takes with respect to the normal methods of appointing and removing Executive officials, I shall briefly state our views as to the constitutionality of the measures here. We believe that judicial appointment is justified by the Appointments Clause, Article II, section 2, and the extraordinary circumstances which would mandate a recourse to a special prosecutor. It is our view that ordinarily Article II, section 2 cannot be used to override the fundamental principle of the separation of powers; this principle would generally require that the Executive be allowed to appoint those officials carrying out Executive functions. However, the circumstances surrounding misconduct by high-level officials and the need to preserve the appearance of justice would warrant a judicial appointment here. In such exceptional circumstances we do not believe that an "incongruous" duty would be imposed upon the courts. See *Ex parte Siebold*, 100 U.S. 371, 398 (1879).

The extraordinary circumstances inherent in the need for resort to a special prosecutor would also justify the restrictions placed on the Executive's power of removal in this instance. Ordinarily Congress may not impose limitations on the Executive's unfettered discretion to remove an Executive official. *Myers v. United States*, 272 U.S. 52 (1926). Subsequent decisions have narrowed this principle to allow for limitations to be placed with respect to those whose quasi-legislative or quasi-judicial duties require a degree of independence from the Executive. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958). It is not entirely clear whether these decisions might apply to Executive officials, see *Morgan v. Tennessee Valley Authority*, 115 F. 2d 990, 994 (6th Cir. 1940); both the explicit language in those decisions, as well as their reliance on the principle of separation of powers, creates the risk that even in such a situation as this the power of the Executive to remove its own officials may not be restricted. However on balance we think that the extraordinary circumstances which would warrant a resort to a special prosecutor would also justify granting him the measure of independence provided in the bill.

While the Department supports the basic approach of this bill, we would suggest that the bill as presently drafted to require resort to a special prosecutor with respect to all federal criminal violations by all the individuals specified in the bill including all Level II executives may be overbroad. We would concede that at least the appearance of conflicts of interest inhere any time the highest-level officials (e.g., the President, Vice President, and the Attorney General) are allegedly involved in any sort of criminal conduct, and we support the appointment of a special prosecutor in such instances. However, we believe that conflicts may not necessarily arise with respect to all of the other individuals specified in the bill or with regard to every violation of the Federal criminal law.

We would suggest, first, that the bill's scope as to the individuals covered might be narrowed. While conflicts of interest may appear with respect to many of the officials specified in the bill, we would submit that no conflict whatsoever exists insofar as some specified individuals are concerned—e.g., most of those serving at Level II of the Executive Schedule. The Department is willing and fully capable to prosecute these individuals where it is warranted, and these individuals are not so close to the President that a conflict of interest would inevitably appear. Of course, if a conflict does develop, the Attorney General could always refer a case to the special prosecutor under the procedure specified in proposed section 592(e).

We would further suggest that the types of crimes included in the bill be narrowed. We agree with the bill's approach of mandating a referral to a special prosecutor in the case of any alleged federal criminal violation insofar as the highest-level officials (e.g., the President, Vice President, and the Attorney General) are concerned. However, it is doubtful whether such conflicts necessarily arise where officials other than those are allegedly involved in criminal conduct which does not involve an abuse of office, obstruction of justice, perjury, or a violation of the election or campaign laws. In these instances we believe that the Department is fully capable of investigating and prosecuting these officials. The principal House bill, H.R. 2835, shares this view, since it mandates a referral to a special prosecutor only in cases involving the sorts of crime just mentioned; this is particularly noteworthy since H.R. 2835 contains in some respects more stringent precautions to ensure against conflicts of interest interfering with the prosecution of official misconduct. Again, if a conflict of interest does arise, the Attorney General could refer it to a special prosecutor under the procedure specified in proposed section 592(e).

It might be said that the adoption of such limitations here would make the bill unnecessarily complex and would not lead to any offsetting advantages. However, we believe that a resort to a special prosecutor should be reserved for those extraordinary instances where the appearance of conflicts of interest is substantial. The appointment of a special prosecutor in instances other than this merely creates unwarranted and undesirable risks—e.g., loss of public confidence in the Department, the undermining of Department . . .

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